79-1120
No.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN N. MITCHELL, ET AL., PETITIONERS

v.

KEITH FORSYTH

JOHN N. MITCHELL, PETITIONER

v.

KATHERINE W. BURKHART, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of John N. Mitchell, E. Davis Porter, and Albert Cooper, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-34a) is reported at 599 F.2d 1203. The opinions of the district courts (App. D, *infra*, 40a-65a; App. E, *infra*, 66a-118a) are reported at 447 F. Supp. 192 and 448 F. Supp. 588.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 35a-37a) was entered on May 22, 1979. A petition for rehearing was denied on August 24, 1979 (App. C, *infra*, 38a-39a). On November 14, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including January 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Attorney General is absolutely immune from personal damages liability for acting pursuant to the President's authority to order electronic surveillance of persons for national security purposes.

2. Whether federal law enforcement officers are absolutely immune from personal damages liability for acting at the direction of the Attorney General to install and monitor an electronic surveillance for national security purposes.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. 2511(3)[1] provided, in pertinent part:

> Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against

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[1] 18 U.S.C. 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797. This statute, which establishes procedures for the conduct of surveillance for national security purposes, was enacted nine years after the events that gave rise to this litigation.

the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

STATEMENT

1. These two cases, which were consolidated by the court of appeals, "involve identical issues, virtually identical defendants and have overlapping records" (App. A, *infra*, 2a). The cases began, however, as separate proceedings in the district court.

a. Forsyth

In June 1970, the Philadelphia office of the FBI learned from a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to protest the Vietnam War by destroying underground utility tunnels in Washington, D.C. The FBI also learned that ECCSL was responsible for several raids on draft board offices and that three members of the group, including William Davidon, a professor at Haverford College, had discussed the possibility of kidnaping National Security Advisor Henry Kissinger (App. A, *infra*, 3a-4a; App. D, *infra*, 43a).

In November, 1970, after additional investigation, Attorney General John Mitchell authorized a wiretap on Davidon's telephone. The purpose of the wiretap was to "gather[] intelligence-type information under circumstances where it was also anticipated that information of a criminal evidentiary nature might be obtained" (App. D, *infra*, 44a). During the maintenance of the wiretap, conversations between Davidon and respondent Keith Forsyth were overheard and recorded (*id.* at 40a-41a).

After respondent Forsyth learned of the wiretap, he instituted this action in the United States District Court for the Eastern District of Pennsylvania against Attorney General Mitchell and two FBI employees who had installed and maintained the electronic surveillance.[2] Respondent sought damages for the overhearing of his telephone conversations, claiming that the warrantless electronic surveillance violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, and the First, Fourth and Ninth Amendments to the Constitution (App. D, *infra*, 40a-41a).

After extensive discovery, petitioners moved for summary judgment on the ground that they were entitled either to absolute immunity or to qualified

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[2] Respondent also named as defendants former Attorney General Richard Kleindienst and former FBI Director L. Patrick Gray. The claims against these defendants were voluntarily dismissed in the district court (App. D, *infra*, 41a n.2).

immunity as a matter of law.[3] The district court denied the motion. The court held that the Attorney General was not entitled to an absolute immunity under *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), because he was not functioning as a prosecutor. The court further held that neither the Attorney General nor the other defendants were entitled to a qualified immunity as a matter of law because "there are genuine issues of material fact in connection with the defendants' affirmative defense of good faith" (App. D, *infra*, 65a), although the court did not specify what those issues might be.

b. Burkhart

The electronic surveillance involved in the *Forsyth* case also formed the basis for several of the charges in *Burkhart*. Respondents Burkhart, Chomsky, Gold, Portnoy and Putter also had conversations that were overheard during monitoring of the wiretap installed on the Davidon telephone. They brought this action in the United States District Court for the Eastern District of Pennsylvania seeking damages under the Fourth Amendment and Title III against Attorney General Mitchell for authorizing that wiretap (App. E, *infra*, 69a).[4]

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[3] Petitioners also argued (i) that they may not be subjected to damages liability under the Constitution because *United States* v. *United States District Court*, 407 U.S. 297 (1972), should not be applied retroactively and (ii) that the statutory requirements and remedies in Title III are inapplicable to national security electronic surveillances. These contentions were rejected by the district court (App. D, *infra*, 47a-57a) and were not raised on appeal. See note 8, *infra*.

[4] Respondents in *Burkhart* also named as defendants former Attorney General William Saxbe and former FBI Director

In addition, respondents Gold, Portnoy and Markel alleged that certain of their conversations over a telephone registered to the Philadelphia chapter of the Black Panther Party were overheard during electronic surveillance authorized by Attorney General Mitchell. This surveillance, which was conducted from June 1970 to February 1971 (App. E, *infra*, 68a n.5), was authorized after the Attorney General had received information indicating that the Black Panther Party had made contact with foreign governments to obtain funds "to support Black Panther revolutionary activities, including the advocacy of the violent overthrow of existent Federal and state government structures" (App. A, *infra*, 6a).

On petitioner Mitchell's motion for summary judgment, the district court concluded that the investigation of ECCSL and Black Panther Party activity was supported by "probable cause * * * to believe that [these] activities * * * were a threat to the national security and that electronic surveillance of the headquarters in order to gather intelligence information about those activities was warranted" (App. E, *infra*, 85a).[5] The court held, however, that under

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Clarence Kelley. Although the claims against these officers have not formally been dismissed, the district court held that there is "no basis for holding these defendants liable" (App. E, *infra*, 110a). See also App. A, *infra*, 13a n.6.

[5] With regard to the ECCSL activities, the district court noted (App. E, *infra*, 81a):

> Through the use of an informant, the FBI uncovered what appeared to be a plot by suspected members of the

United States v. *United States District Court, supra,* the failure to obtain a warrant for these national security surveillances violated the Fourth Amendment.[6] The court concluded that the Attorney General was not absolutely immune from personal damages liability for constitutional violations occurring in the authorization of national security surveillances (App. E, *infra,* 113a n.33). Finally, the court re-

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ECCSL to kidnap Henry Kissinger, then National Security Advisor to the President, and simultaneously destroy the heating systems of certain federal buildings located in Washington, D.C. In addition, the FBI furnished Mitchell with background information concerning the activities of William Davidon and the basis for its conclusion that he was an active member and central figure in the ECCSL. Based on this information, Mitchell approved the FBI's request to place a wiretap on Davidon's residence telephone.

The court explained that the threat to national security from ECCSL activity was substantial because (*id.* at 82a):

> the intended victim of the kidnap plot was the President's senior national security advisor, who was engaged at that time in high level, extremely sensitive negotiations with North Vietnam, a hostile foreign government. It would be ludicrous to suggest that because the plot to kidnap that official constituted a violation of federal law, the national security purpose for conducting the surveillance was either nonexistent or irrelevant.

[6] The court held, on the other hand, that Title III is inapplicable to warrantless national security electronic surveillances, relying on this Court's conclusion in *United States* v. *United States District Court, supra,* 407 U.S. at 306, that Congress in Title III "simply did not legislate with respect to national security surveillances" (App. E, *infra,* 106a).

jected the claim that petitioner was entitled to a qualified immunity as a matter of law, stating that the existence of a good faith defense "should be determined on the basis of evidence adduced at trial rather than on a motion for summary judgment" (*id.* at 114a).

2. On appeal from the denial of the motions for summary judgment,[7] the court of appeals held that it had jurisdiction over petitioners' claim that they were entitled to absolute immunity but lacked jurisdiction over the claim that they were entitled to a qualified immunity.[8] On the merits, the court held that, under

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[7] Petitioners asked the trial judges to certify interlocutory appeals of their orders denying summary judgment pursuant to 28 U.S.C. 1292(b). This request was denied in *Burkhart* and was not ruled upon in *Forsyth* (App. A, *infra*, 10a). Accordingly, petitioners filed notices of appeal pursuant to 28 U.S.C. 1291.

[8] The court of appeals ruled that the refusal to grant a summary judgment motion based on a claim of absolute immunity is an appealable collateral order within its jurisdiction under 28 U.S.C. 1291 (App. A, *infra*, 12a). The court noted that the purpose of absolute immunity "is to grant the defendant the right not to be subjected to trial, not just the right not to be found guilty" (*id.* at 9a). The court therefore concluded that the denial of a claim of absolute immunity is appealable under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), because the right not to be subjected to trial "is irretrievably lost if appellate review must await final adjudication on the merits" (App. A, *infra*, 12a). See *Helstoski* v. *Meanor*, No. 78-546 (June 18, 1979); *Abney* v. *United States*, 431 U.S. 651 (1977).

The court held, however, that it lacked jurisdiction over petitioners' claim of qualified immunity because that issue did not separately satisfy the requirements of the collateral order doctrine (App. A, *infra*, 12a). Although we disagree with

Butz v. *Economou*, 438 U.S. 478, 515 (1978), the Attorney General is not absolutely immune from personal damages liability for his official acts except when performing functions analogous to those of a prosecutor (App. A, *infra*, 25a-29a). The court remanded the cases to the district court for a determination whether, in authorizing the electronic surveillances challenged by respondents, the Attorney General was exercising a prosecutorial function or was engaged in "a purely investigative or administrative function" (*id.* at 29a).

The court also rejected the claim that the defendant FBI officers are entitled to "absolute immunity from suit derivatively from the absolute immunity accorded to the Attorney General" (*id.* at 31a). The court held that law enforcement officers do not have an immunity that derives from the immunity of the superiors at whose direction they act. Instead, the court held that these officers are entitled to only a good faith qualified immunity under the standards of *Schever* v. *Rhodes*, 416 U.S. 232 (1974) (App. A, *infra*, 32a-33a).[9]

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this conclusion as applied to a claim that a defendant is entitled to a qualified immunity as a matter of law, we do not seek review of this aspect of the court of appeals' decision.

[9] The court of appeals relied for this conclusion on its prior decision in *Johnson* v. *Alldredge*, 488 F.2d 820 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974). In *Johnson*, the court held that, although a prison warden was entitled to an absolute immunity in the context of that case, prison guards were entitled to only a qualified immunity "even though they were merely implementing the policies formulated by the warden" (App. A, *infra*, 32a).

REASONS FOR GRANTING THE PETITION

This case presents important and unsettled questions concerning the immunity of the Attorney General and of law enforcement officers who act at his direction. The question of the scope of the immunity afforded to the Attorney General in authorizing electronic surveillance for national security purposes is presented in our petition for a writ of certiorari in *Kissinger* v. *Halperin*, No. 79-880 (filed Dec. 7, 1979), along with a complete statement of the reasons why that question warrants this Court's review.[10] The scope of the derivative immunity to be afforded to officers who act at the Attorney General's direction necessarily turns, at least in part, on the nature of the immunity afforded the Attorney General.[11] We

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[10] We are providing counsel for respondents with a copy of our petition in *Kissinger*. We have filed petitions raising the same or similar issues in *Mitchell* v. *Zweibon*, No. 79-881 (filed Dec. 7, 1979), and *Nixon* v. *Smith*, No. 79-882 (filed Dec. 7, 1979).

[11] The derivative immunity of officers who act on behalf of the President is discussed at pages 20-22 and note 10 of our petition in *Kissinger* and is an issue before the Court in that case. The decision of the court of appeals in this case that law enforcement officers are not entitled to a derivative immunity when acting at the directions of a superior in conducting a search (App. A, *infra*, 32a-33a), conflicts with *Heine* v. *Raus*, 399 F.2d 785, 790 (4th Cir. 1968) ("Recognition of an absolute privilege of the subordinate by attribution of the superior * * * appears to be a necessary corollary of the superior's privilege"), and is inconsistent with *Doe* v. *McMillan*, 412 U.S. 306, 320 (1973) (Public Printer is absolutely immune from damages liability for carrying out functions that, if performed by a Congressman, would be within the

therefore believe that the disposition of this petition should be deferred pending disposition of the petition in *Kissinger*.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of *Kissinger* v. *Halperin*.

Respectfully submitted.

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JANUARY 1980

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protection of the Speech or Debate Clause). See also *Spaulding* v. *Nielsen*, 599 F.2d 728, 729 (5th Cir. 1979) (probation officer is absolutely immune from damages liability because he acts "at the direction of the court").

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 78-1611, 78-1847

KEITH FORSYTH, APPELLEE

v.

RICHARD G. KLEINDIENST, Individually and as Attorney General of the United States, L. PATRICK GRAY, 3rd, Individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE, ALBERT COOPER and DAVID PORTER.

APPEAL OF JOHN N. MITCHELL, E. DAVIS PORTER, and ALBERT COOPER

KATHERINE W. BURKHART, JUDITH CHOMSKY, EVA GOLD, DINA PORTNOY, CANDY PUTTER, JOSHUA (JOSH) MARKEL, APPELLEES

v.

WILLIAM SAXBE, Individually and as Attorney General of the United States, CLARENCE KELLEY, Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE, and RICHARD ROE

APPEAL OF JOHN N. MITCHELL, CLARENCE KELLEY, and WILLIAM SAXBE

Argued Feb. 23, 1979

Decided May 22, 1979

Before HUNTER and WEIS, Circuit Judges, and MARKEY, Chief Judge, Court of Customs and Patent Appeals.*

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

This appeal is a consolidation of two related actions before different district court judges in the Eastern District of Pennsylvania.[1] The actions involve identical issues, virtually identical defendants and have overlapping records. The defendants, former Attorneys General of the United States, a former Director of the Federal Bureau of Investigation, and agents of the Federal Bureau of Investigation, appeal from the denial of their motions for summary judgment. First, the defendants contend that both district courts erred in holding that the defendants are not entitled to absolute immunity. Alternatively, the defendants contend that the district courts erred in not granting them qualified immunity as a matter of law.

We conclude that the district court's denials of defendants' motions for summary judgment on the issue of absolute immunity are appealable at this time under the collateral order doctrine. Both *Forsyth* and

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* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

[1] *Forsyth* v. *Kleindienst* is reported at 447 F.Supp. 192 (E.D.Pa. 1978). *Burkhart* v. *Saxbe* is found at 448 F.Supp. 588 (E.D.Pa. 1978).

Burkhart will be remanded to the respective district court to apply the test developed in this opinion to the facts of each case. On the defendants' contention that they are, in any event, entitled to qualified immunity as a matter of law, we hold that the denial of the motion for summary judgment on this issue is not a final judgment and is, therefore, not appealable at this time. Finally, we reject the individual FBI agents' contention that they are entitled to derivative absolute immunity.

I.

These cases arise out of warrantless electronic surveillances authorized by the Attorney General and executed by FBI agents in the early 1970's. The wiretaps resulted in the overhearing of telephone conversations between the plaintiffs and members of organizations under investigation. The plaintiffs were not themselves under investigation.

Forsyth

Plaintiff Keith Forsyth was overheard through a tap directed against William Davidon, a professor at Haverford College, who was allegedly associated with the East Coast Conspiracy to Save Lives (ECCSL). The Philadelphia FBI office learned in June, 1970 that the ECCSL was planning to protest the Vietnam War by destroying underground utility tunnels in Washington, D.C. The FBI also had information that the ECCSL had been responsible for several raids on draft board offices. In August, 1970 the government

obtained copies of letters written by Father Phillip Berrigan and Sister Elizabeth McAlister which indicated that three people, including Professor Davidon, had discussed the possibility of kidnapping National Security Advisor Henry Kissinger. On November 6, 1970, after additional investigation, Attorney General John Mitchell authorized the FBI to place a wiretap on the telephone of Professor Davidon. The tap continued with one extension until January 6, 1971. According to FBI Special Agent Fields, the purpose of the tap was primarily to gather intelligence information, although it was anticipated that information of a criminal evidentiary nature might also be obtained. The monitoring agents were instructed to record all conversations unless it was known that one of the parties to the conversation was a defendant in a federal criminal case or was an attorney for a criminal defendant. No other instructions were given to minimize the scope of the interceptions. Forsyth was overheard on three occasions.

Forsyth sued for damages under the first, fourth, sixth, and ninth amendments to the Constitution, and under 18 U.S.C. § 2520 (1976).[2] After discovery, in-

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[2] Section 2520 of Title 18 (1976) provides a private cause of action and damages for violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wire Interception and Interception of Oral Communications). 18 U.S.C. §§ 2510-2520 (1976). It provides:

> Recovery of civil damages authorized
>
> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person

cluding the deposing of defendant Mitchell, both sides moved for summary judgment. On February 14, 1978 the district court denied the motions for summary judgment. First, the court held that the defendants were not entitled to absolute immunity. Second, it held that there was a genuine dispute over material facts which precluded summary judgment on the issue of qualified immunity. *See* Fed.R.Civ.P. 56 (c).

Burkhart

Plaintiffs in *Burkhart* were overheard on both the Davidon tap and a tap directed against the Black Panther Party. The Black Panther tap was originally authorized on June 1, 1970 and continued until February 10, 1971. Two reauthorizations in the interim were required because phone service to the Black Panther party headquarters was terminated and the headquarters moved to a new location. Attorney General Mitchell stated in an affidavit that he

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who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recovery from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

authorized the Black Panther tap because he had information that the Party had made foreign "contacts . . . for the purpose of obtaining foreign funds to support Black Panther revolutionary activities, including the advocacy of the violent overthrow of existent Federal and state government structures."

Plaintiffs in *Burkhart* also sued for damages for violations of their rights under the first, fourth, sixth, and ninth amendments to the Constitution, and under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *See* note 2 *supra.* The district court first denied the defendants' claims of absolute immunity in July, 1975. *Burkhart* v. *Saxbe*, 397 F.Supp. 499 (E.D.Pa. 1975). Later cross motions for summary judgment were filed, and argument was heard jointly with that in *Forsyth.* The district court denied both sides' motions for summary judgment on March 21, 1978. As in *Forsyth*, the *Burkhart* court found material questions of fact in dispute which precluded summary judgment on the issue of qualified immunity. Also, it refused to reverse its earlier decision denying the defendants' motion to dismiss on the issue of absolute immunity.

Plaintiffs in both actions rely on *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), (*Keith*), to establish a violation of their fourth amendment rights. There, the Supreme Court held that the fourth amendment requires that a warrant be obtained before engaging in surveillance of a domestic organization, even if the domestic organization threatens national security. In

the context of this case, we have no occasion to review the district courts' holdings that the wiretaps authorized here were unconstitutional under *District Court*. Nor will we address the district courts' holdings that *District Court* is to be given retroactive effect. The sole issue before us is whether the defendants are entitled to absolute immunity.

II.

Initially, we are presented with the plaintiffs' contention that we lack appellate jurisdiction to review the district courts' denials of defendants' motions for summary judgment. Generally, the denial of a motion for summary judgment is not appealable. *Hart* v. *Overseas National Airways, Inc.*, 541 F.2d 386, 394 (3d Cir. 1976). Nevertheless, defendants contend that we have appellate jurisdiction under the final judgment rule, 28 U.S.C. § 1291 (1976).[3] As early as 1949 the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949), emphasized that section 1291 must be given a "practical rather than a technical construction." Under the *Cohen* collateral order doctrine, appellate courts have jurisdiction over orders which "finally determine claims of right separable from, and collateral to, rights as-

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[3] Section 1291 of Title 28 (1976) provides in part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

serted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. at 1225-1226. The Supreme Court in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), summarized the three requirements of *Cohen*.[4] To be appealable a district court's order must 1) conclusively determine the disputed question; 2) resolve an important issue completely separate from the merits of the action; and 3) be effectively unreviewable on appeal from a final judgment. *Id.* at 468-69, 98 S.Ct. 2454. *See also United States* v. *MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978) (district court's order denying motion to dismiss indictment because of alleged violation of sixth amendment rights to speedy trial not appealable before trial).

The district courts' denials of the defendants' motions for summary judgment on absolute immunity must be analyzed under these three standards. *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), is closely analogous to our case. There, the Supreme Court addressed the question of whether a pretrial order denying defendants' motion to dismiss on the ground of double jeopardy is a final order under section 1291. In finding appeal-

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[4] In *Livesay* the Court applied the *Cohen* collateral order doctrine to determine that the denial of a motion for class certification is not appealable under 28 U.S.C. § 1291 before trial.

ability, the Court stressed particularly the third of the three *Cohen* factors—that the district court's decision involved an important right which would be lost if appellate review had to await adjudication on the merits. And, in characterizing the right which the defendant would lose absent immediate review, the Court noted: "[The defendant] is contesting the very authority of the Government to hale him into court to face trial on the charge against him. . . The elements of that claim are completely independent of his guilt or innocence." *Id.* at 659-60, 97 S.Ct. at 2040.

We agree with the defendants' argument that the rights protected by the double jeopardy clause and the doctrine of absolute immunity are similar. The underlying purpose of each is to grant the defendant the right not to be subjected to trial, not just the right not to be found guilty. A case quite similar to that before us is *Briggs* v. *Goodwin*, 186 U.S.App. D.C. 179, 569 F.2d 10 (1977) (Wilkey, J. writing for the majority on the issue of appealability), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978). There, the court considered the appealability of the denial of a defendant's motion to dismiss because he was, as a witness in a criminal proceeding, absolutely immune from prosecution under the doctrine of quasi-judicial immunity. In finding appellate jurisdiction the court, also stressing the third of the three *Cohen* criteria, noted that the purpose of absolute immunity is "as much to protect the relevant persons from a trial on their actions as it is to protect them from the outcome of trial." *Id.* at 59. The court

interpreted *Abney* as formulating the following test: "whether the relevant rights that were the subject of the pretrial order would be 'significantly undermined' if appellate review had to await final action in the case." *Id. See also McSurely* v. *McClellan*, 172 U.S. App.D.C. 364, 521 F.2d 1024, 1032 (1975), *en banc*, 180 U.S.App.D.C. 101, 553 F.2d 1277 (1976), *cert. dismissed as improvidently granted*, 438 U.S. 189, 98 S.Ct. 3116, 57 L.Ed.2d 704 (1978) (on appeal from denial of motion to dismiss for absolute immunity under the Speech & Debate Clause, "the question of appealability does not turn on the correctness of an appellant's claim[s]").

Furthermore, defendants here are not precluded from relying on the collateral order doctrine merely because they were unsuccessful in their attempts to have the question of absolute immunity certified under 28 U.S.C. § 1292(b) (1976).[5] A section 1292(b) motion was filed in each action: the motion was denied in *Burkhart* and was not ruled upon in *Forsyth*. Simply stated, the collateral order doctrine and sec-

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[5] Section 1292(b) of Title 28 (1976) provides in part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

tion 1292(b) serve different goals. Section 1292(b) permits the district court to certify an order to the appellate court if the court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Thus, institutional efficiency is a major purpose of the certification provision. *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) (used in exceptional cases where an intermediate appeal would avoid protracted and expensive litigation). *Accord, Kraus* v. *Board of County Road Commisioners for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966) (purpose to avoid protracted and expensive litigation); *E. F. Hutton & Co.* v. *Brown*, 305 F.Supp. 371, 402-03 (D.C.Tex.1969) (purpose to shorten time, effort, and expense exhausted between filing of lawsuit and its termination). A central goal of the collateral order doctrine, however, is to prevent the loss of rights merely because appellate review is delayed until the litigation has run its full course in the lower court. As noted in *Briggs*, "[s]ince the discretion of the trial judge whether to certify is itself unreviewable, the value of immediate review in the 'small class' of cases where it is warranted under the collateral order doctrine could be irretrievably lost if [the] view that denial of certification *per se* bars interlocutory review were to prevail." 569 F.2d at 60.

We hold that the denial of the defendants' motions for summary judgment on the issue of absolute immunity is appealable under the *Cohen* collateral order doctrine. Appellate review at this time will conclusively determine the disputed question and will resolve an important issue completely separate from and collateral to the question of the defendants' guilt or innocence. Moreover, the denial of absolute immunity is effectively unreviewable on appeal. Since the right which absolute immunity protects is the right not to be subjected to trial, it is irretrievably lost if appellate review must await final adjudication on the merits. *See McSurely* v. *McClellan*, 172 U.S. App.D.C. 364, 521 F.2d 1024 (1975), *en banc*, 180 U.S.App.D.C. 101, 553 F.2d 1277 (1976), *cert. dismissed*, 438 U.S. 189, 98 S.Ct. 3116, 57 L.Ed.2d 704 (1978).

Finally, we reject the defendants' suggestion that we take this opportunity to review the district courts' denials of their motions for summary judgment on the issue of qualified immunity. The Supreme Court in *Abney*, while upholding appellate jurisdiction over the double jeopardy claim, concluded that an appellate court lacked jurisdiction over the defendant's accompanying contention that the district court erred in refusing to dismiss the indictment for failure to state an offense. The Court held that "such claims are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule." 431 U.S. at 663, 97 S.Ct. at 2042. Though the defendants may ultimately prevail on

the issue of qualified immunity, they do not seriously contend that the denials of their motions for summary judgment on that issue are appealable under the three requirements of *Cohen*.

III

We are presented, then, with the defendants' contention that they are entitled to absolute immunity. We recognize, as did the defendants, that the availability of absolute immunity to the individual agents who executed the surveillances may rest on different considerations from those urged by former Attorney General Mitchell.[6] Thus, we analyze the two problems separately.

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[6] We have omitted from our discussion any mention of the defendants who were high level federal officials other than former Attorney General Mitchell. In *Forsyth* the district court dismissed the claims against defendants former Attorney General Richard G. Kleindienst and former Director of the FBI L. Patrick Gray. Plaintiffs have not challenged the dismissal.

In *Burkhart* two of the defendants, former Attorney General William Saxbe and former Director of the FBI Clarence Kelley, have apparently not been formally dismissed. However, neither Saxbe nor Kelley was in office at the time the surveillances occurred. *Burkhart* noted that there is no basis for holding them liable for violating the fourth amendment rights of the plaintiffs. Plaintiffs are left only with a claim against Saxbe and Kelley for illegal use or disclosure of the taped material, an offense arising under 18 U.S.C. § 2520. *See* note 2 *supra*. On these issues, the district court stated: "Defendants, Saxbe and Kelley, having taken office subsequent to the termination of the wiretaps in question and there being no support on the record for plaintiffs' allegations of use and disclosure, I see no basis for holding

Former Attorney General Mitchell contends that he is absolutely immune from civil liability for his decision to authorize the warrantless electronic surveillances. As the head of an executive agency, the Department of Justice, he argues that he should not be held liable for what he characterizes as an error in judgment. His argument stresses that the wiretaps which gave rise to these suits occurred in 1970 and 1971, but that the Supreme Court did not definitely decide until 1972 that the warrantless electronic surveillance of domestic organizations violated the fourth amendment. *See United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). He argues that his only error was a failure to predict accurately what the Supreme Court would later hold. Also, he directs us to the possibility of harassing lawsuits which he contends would hamper the effective discharge of the duties of the Attorney General if we were to hold that he is not entitled to absolute immunity.

The Supreme Court considered the scope of immunity for the heads of federal executive agencies in *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). There, Economou brought suit against a number of officials in the Department of Agriculture. The corporation which the plaintiff controlled, Arthur N. Economou and Co., had been registered with the Department of Agriculture as a

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these defendants liable." 448 F.Supp. at 607 (footnote omitted). Because of their uncertain status, we do not discuss them individually. We note, however, that the principles developed by this opinion would apply equally to them.

commodity futures commission merchant. The Department sought to revoke the registration, contending that the plaintiff had failed to maintain the required financial reserve. A hearing was held, and the Chief Hearing Examiner sustained the administrative complaint. His decision was affirmed by the Department's Judicial Officer. Economou contended that the administrative proceeding had been initiated in retaliation for his sharp criticism of the Commodity Exchange Authority. He sought damages against several officials in the Department of Agriculture—including the Secretary, the Judicial Officer, the Chief Hearing Examiner, and the Department attorney who had presented the Department's objections—for violations of his due process and first amendment rights. The district court granted the defendants' motion to dismiss on the ground of absolute immunity, and the Second Circuit reversed, reasoning that *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), established that officials of the executive branch exercising discretionary functions would be adequately protected by only a qualified immunity.

The Supreme Court reversed. While remanding for further proceedings, the Court held that the Secretary, and the other Agriculture Department officials involved in the administrative proceeding, might be entitled to absolute immunity from suit. The Court first distinguished *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and in the process, cut much of the force out of the Attorney General's argument here. The defendant in *Barr*, the

acting director of an executive agency, claimed absolute immunity from a malicious defamation suit brought by two former employees. The Supreme Court's plurality opinion held that the official was absolutely immune since the issuance of the defamatory press release was "within the outer perimeter of [the defendant's] line of duty" and was "an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." 360 U.S. at 575, 79 S.Ct. at 1341. The Court succinctly stated its rationale for granting absolute immunity:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties —suits which would consume time and energies which would otherwise be devoted to government service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Id. at 571, 79 S.Ct. at 1339. In balancing the deprivation to the individual denied a remedy against the interest of governmental efficiency, the Court recognized that "there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good." *Id.* at 576, 79 S.Ct. at 1342.

The plaintiffs in *Barr* alleged defamation, a cause of action arising under state tort law; in *Butz*, the Court was presented with allegations of constitutional deprivations. This distinction, in the Supreme Court's view, was crucial:

> [W]e are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but has also violated those fundamental principles of fairness embodied in the Constitution. Whatever level of protection from state interference is appropriate for federal officials executing their duties under federal law, it cannot be doubted that these officials, even when acting pursuant to congressional authorization, are subject to the restraints imposed by the Federal Constitution.

98 S.Ct. at 2905 (footnote omitted). Thus, the considerations central to the result in *Barr*—the need to protect an official exercising his discretion and the need to limit harassing suits which would impair the vigorous discharge of his duties—are insufficient to justify the grant of absolute immunity to high officials of executive agencies when violations of federal constitutional law, as opposed to state tort law, are asserted.

Having distinguished *Barr* v. *Matteo*, the Supreme Court looked to *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), to supply the governing legal principles. There it had confronted the scope of immunity available to a state governor sued under 42 U.S.C. § 1983 for suppressing a civil disturbance in an unconstitutional manner. *Butz* characterized *Scheuer* as resolving the problem of "how best to reconcile the plaintiff's right to compensation with the need to protect the decision making processes of an executive department." The result of the balance in *Scheuer* was to grant the state

governor only a qualified, or good faith, immunity from suit.[7] *Butz* extended *Scheuer* to provide the general rule for federal officials as well.[8]

Butz and *Scheuer* undermine the Attornel General's policy arguments here. First, he contends that his prediction that warrantless electronic surveillance would not be held to violate the fourth amendment was essentially a discretionary act for which he should not be held liable. We have noted, however, that *Barr's* holding that federal officials exercising discretionary functions are absolutely immune from suit under state tort law does not apply in the face of allegations of constitutional deprivations. The *Butz* Court balanced the competing considerations: "*Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or

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[7] The Supreme Court defined "good faith" for the purposes of establishing qualified immunity from a suit based on § 1983 in *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). The Court held that an official would not be immune from liability if he knew or should have known that the action he took would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation. *Id.* at 322, 95 S.Ct. 992.

[8] The *Butz* Court reasoned:

> The constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible. The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do state officers.

98 S.Ct. at 2908 (emphasis in original).

should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." 98 S.Ct. at 2911. More fundamentally, the Attorney General's justification that the law was unsettled when he authorized the warrantless surveillance does not distinguish between absolute and qualified immunity. If he can establish that the law was unsettled, and that he acted without malice, he will prevail on his claim of qualified immunity. *See Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). *See also* note 7 *supra*. As we have stressed, the question before us is not ultimate liability; rather it is whether the Attorney General should be protected even from the burden of defending himself at trial.

Second, the Attorney General contends that he is entitled to absolute immunity because a lesser level of protection would permit an Attorney General to be subject to frivolous, harassing lawsuits which would chill the vigorous discharge of his duties. *Butz*, however, was unconcerned with this problem. The Court noted that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." 98 S.Ct. at 2911.

IV.

The Supreme Court in *Butz* held that "in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 98 S.Ct. at 2911. We read the holding as placing a heavy burden on the defendants to demonstrate a need for protection greater than that provided by qualified immunity.[9] As our starting point we must undertake "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id., quoting Imbler* v. *Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976).

In *Imbler* the Supreme Court granted absolute immunity to a state prosecutor from a suit under 42 U.S.C. § 1983 charging him with the knowing use of perjured testimony. The plaintiff contended that the state prosecutor could not, as a member of the executive branch, claim quasi-judicial absolute

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[9] The Court in *Butz* noted:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: . . . In light of this principle, federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.

98 S.Ct. at 2910-2911.

immunity. The Supreme Court rejected the plaintiff's argument. It stated that its earlier decisions on section 1983 immunities did not rest solely on the branch of government in which the defendant worked. 424 U.S. at 421, 96 S.Ct. 894. After determining that a prosecutor was entitled at common law to absolute immunity from suit, the Court examined the common law rule in light of section 1983. In upholding the grant of absolute immunity, it noted that a state prosecutor would be particularly unable to defend himself from a potential flood of section 1983 suits; that the ultimate fairness of the criminal justice system might be upset by subjecting prosecutors to suit; and that the inherent independence of the judicial system provides procedures to check excessive prosecutorial zeal and determine whether the accused has received a fair trial. 424 U.S. at 425-28, 96 S.Ct. 894.

The Attorney General here relies on *Imbler*. He analogizes his position to that of a state prosecuting attorney, and argues that because their positions are similar, he too should be entitled to the shield of absolute immunity. The Attorney General's claim to absolute immunity, therefore, is measured by that extended to the state prosecutor in *Imbler*. We search, then, for the boundaries to that immunity.

At the outset, the Attorney General cannot effectively contend that his functions are coextensive with those of a prosecuting attorney. Though as a shorthand expression he has been called the nation's "chief prosecuting attorney," his duties and responsibilities are far greater than those of the ordinary prosecu-

tor.[10] The distinction is important because the Supreme Court in *Butz* and *Imbler* intended a functional test rather than one based on status or title.[11] *Butz* particularly stressed the need to make an inquiry into the particular decision challenged to determine whether an official is entitled to absolute immunity. There, the Secretary of Agriculture had the statutory power to initiate proceedings whenever he had reason to believe that a person had violated the statute or the rules, regulations, or orders of the Secretary of Agriculture or the Commission. 7 U.S.C. § 9.[12] The Court noted that "[t]he decision to initiate

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[10] For example, the Attorney General is charged with the duty of giving legal advice to the President, 28 U.S.C. § 511 (1976); to the heads of other executive departments, *id.* at § 512; and to the Secretaries of military departments, *id.* at § 513. His purely administrative duties range from providing for the publication and distribution of his opinions, *id.* at § 521, to appropriating money for the meals and lodging of bailiffs, *id.* at § 524. Moreover, the Federal Bureau of Investigation is within the Department of Justice, *id.* at § 531. And, the Attorney General has the power to appoint officials to detect and prosecute crimes against the United States and to conduct other investigations regarding official matters under the control of the Department of Justice, *id.* at § 533.

[11] The Eighth Circuit in *Tigue* v. *Swaim*, 585 F.2d 909 (8th Cir. 1978), similarly read *Butz* as demanding a functional approach: "*Butz* demands a particularized inquiry into the functions an official performs and the circumstances under which they are performed prior to the granting of absolute immunity," not merely an inquiry into the status or title of the official claiming the protection.

[12] The statute has since been amended to provide that the Commission, and not the Secretary, has the power to initiate proceedings. 7 U.S.C. § 9, *as amended by* Act of Oct. 23, 1974, Pub.L.No. 93-463, 88 Stat. 1392.

administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." 98 S.Ct. at 2915. In granting the Secretary absolute immunity over the decision to institute administrative proceedings, the Court held: "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity *with respect to such acts*." *Id.* (emphasis supplied)[13]

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[13] The Attorney General urges that an important factor in the *Butz* decision to grant absolute immunity against a suit challenging a decision by the Secretary to initiate the administrative proceeding was the existence of checks, other than private damages actions, on the Secretary's conduct. Thus, in *Butz* the Court stressed that "legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal." 98 S.Ct. at 2916. More generally, "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." 98 S.Ct. at 2914. The Attorney General argues that there are sufficient checks on his decision to authorize warrantless electronic wiretaps that he, too, should be immune from private remedy. He points out that the Attorney General is an officer of the court, subject to professional discipline, and that Congress has the power to overturn his judicial interpretations.

We are not necessarily persuaded by the Attorney General's argument. The checks to which he directs our attention are not analogous to the multitude of independent checks and safeguards operating inherently, without the need of special invocation, in the judicial system. It is because of the "features of the judicial process" that "there is a less pressing need for individual suits to correct constitutional error." *Butz*, 98 S.Ct. at 2914. The plaintiffs here were not the sub-

Imbler v. *Pachtman*, as well, utilized a functional approach. It suggested that even a prosecuting attorney would not be absolutely immune from suit for actions which are not closely connected with the judicial process. The Supreme Court's holding was narrow: "We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." 424 U.S. at 431, 96 S.Ct. at 995. The Court emphasized that the prosecutor's activities "were intimately associated with the judicial phase of the criminal process," and therefore, were "functions to which the reasons for absolute immunity apply with full force." *Id.* at 430, 96 S.Ct. at 995. While leaving open the question of whether a prosecutor is entitled to absolute immunity for other actions, Justice Powell made the following comments:

> We recognize that the duties of the prosecutor in his role as an advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. . . . These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial,

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jects of criminal investigations. If they are denied an opportunity to present their case by the doctrine of absolute immunity the defendants' allegedly unconstitutional conduct may never be subject to judicial scrutiny in any forum.

> may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33.

Cases in other circuits both before and after *Imbler* have distinguished between a prosecutor's quasi-judicial functions on the one hand and his investigative and administrative functions on the other, granting absolute immunity to the former and relegating the latter to qualified immunity. In *Apton* v. *Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974), plaintiffs contended that the Attorney General, other high ranking Department of Justice officials, and members of the District of Columbia Police Department violated their fourth amendment rights. Specifically, plaintiffs complained that they were detained without probable cause during the May Day demonstrations in 1971. The D.C. Circuit held that the Attorney General was not entitled to absolute immunity for his part in directing the May Day police activity. The Court reasoned that "the absolute immunity often accorded prosecuting attorneys cannot shield the defendants in this case, for the prosecutor's absolute protection, like that of the judge from which it is derived, is both justified and bounded by the judicial traditions and procedures that limit and contain the danger of abuse." *Id.* at 93 (footnotes omitted). The court

held that in the course of directing police investigative activity, the Attorney General would not be entitled to absolute immunity. *See Guerro* v. *Mulhearn*, 498 F.2d 1249 (1st Cir. 1974) (absolute immunity does not relate to acts done in the prosecutor's investigatory role); *Hampton* v. *City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974) (states attorney not absolutely immune for planning and executing illegal raid); *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972); *Dodd* v. *Spokane County, Washington*, 393 F.2d 330, 335 (9th Cir. 1968). *See also Jennings* v. *Shuman*, 567 F.2d 1213, 1221 & n. 15 (3d Cir. 1977), which questions the correctness of the scope of immunity afforded in *Briggs* v. *Goodwin*, 186 U.S.App.D.C. 179, 569 F.2d 10, 19-20 (1977), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978).

This court has not been squarely presented with the problem of the scope of immunity for prosecutorial conduct which lies outside of the advocatory function but within a prosecutor's duties as an administrator or investigator. In *Brawer* v. *Horowitz*, 535 F.2d 830 (3d Cir. 1976), we were confronted with plaintiff's contentions that a federal prosecutor had knowingly used perjured testimony. We held: "[A] federal prosecutor is absolutely immune from suit where the allegations relate solely to his initiating and presenting a criminal case. The allegations of the complaint implicating [the defendant-federal prosecutor] all related to his actions in his role as

an advocate, rather than as an administrator or investigator." *Id.* at 834, *citing Imbler* v. *Pachtman*, 424 U.S. at 431 & n. 33, 96 S.Ct. 984. In *Helstoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977), this court in a per curiam opinion considered the immunity available to a federal prosecutor against a suit alleging that he deliberately leaked false information about the plaintiff to damage the plaintiff's political prospects. While finding it unnecessary to decide whether absolute immunity protects a U.S. Attorney's administrative and investigative functions, we held that for some conduct a prosecutor may only be entitled to only qualified immunity: "It would appear that [the deliberate leaking of false information], if it occurred would lie outside of the rationale for absolute immunity set forth in *Imbler*." *Id.* at 566.

Thus, the advocatory/investigative distinction has been cited with approval in this court.[14] We hold that

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[14] Defendants contend that this court rejected the advocatory/investigative distinction in *Cambist Films, Inc.* v. *Duggan*, 475 F.2d 887 (3d Cir. 1973). There, a state prosecuting attorney was sued for his actions in investigating a violation of the laws of Pennsylvania. The court, granting the prosecutor absolute immunity, held: "Obviously, this case in no way approaches the 'clear absence of jurisdiction' standard required for possible liability on the part of the prosecutor." *Id.* at 889. We distinguish *Cambist* on two grounds. First, *Cambist* involved a common law tort action. Any statement on the scope of immunity from allegations of constitutional deprivations is only dicta in that opinion. Second, *Cambist* cites *Robichaud* v. *Ronan*, 351 F.2d 533 (9th Cir. 1965), as defining the distinction between "excess of jurisdiction" and

where the activities of the Attorney General depart from those which cast him in his quasi-judicial role, the protection of absolute immunity will not be available. *Helstoski* v. *Goldstein*, 552 F.2d 564 (3d Cir. 1977).

Justice Powell noted in *Imbler* that drawing the line between protected and unprotected conduct will be difficult. 424 U.S. at 431 n. 33, 96 S.Ct. 984. This case, dealing essentially with investigative activity, is within that gray area. We recognize that the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decisionmaking and the potential for needless actions. We believe

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"complete absence of jurisdiction." *Robichaud*, however, stands squarely for the proposition that:

> [W]hen a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the reason for his immunity—integral relationship between his acts and the judicial process—ceases to exist. If he acts in the role of a policeman, then why should he not be liable, as is the policeman, if in so acting, he has deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws?

351 F.2d at 536. *See also Bauers* v. *Heisel*, 361 F.2d 581, 591 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967).

that the right to make the decision without being subject to suit must include some limited right to gather necessary information. At the same time, we are sensitive to the possibility that this narrow exception could be distorted to include all of a prosecutor's investigative activities. We hold only that to the extent that this securing of information is necessary to a prosecutor's decision to initiate a criminal prosecution, it is encompassed within the protected, quasi-judicial immunity afforded to the decision itself.

V.

Our reading of *Butz* and *Imbler* leads us to the conclusion that the Attorney General's decision to authorize the warrantless electronic surveillances is protected by the shield of absolute immunity when it is made in the context of a quasi-judicial function; however, when the decision arises in the context of a purely investigative or administrative function, the decision will not be protected by absolute immunity.[15] We foresee that a limited factual inquiry may in some cases be necessary to determine in what role

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[15] In language which may bear on the resolution of this issue, the Supreme Court in *Butz* pointed out:

> It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for a regime or lawless conduct.

98 S.Ct. at 2910.

the challenged function was exercised. We recognize that this may result in some dilution of the protection of absolute immunity. However, this approach is necessary to protect fully the government official performing a protected function; at the same time, we must permit a private remedy to those whose constitutional rights were violated by an official acting outside the scope of absolute immunity.[16]

In *Forsyth* the district court found that "in authorizing the warrantless wiretap in this case, the Attorney General was functioning as an administrator rather than as an officer of the court," and denied the claim of absolute immunity. 447 F.Supp. at 201. However, the court has provided us with no statement of the reasons for its decision that the authorization of the warrantless wiretaps in this case falls within the Attorney General's administrative function. As we have noted, if the decision to authorize the wiretaps was made by the Attorney General in an attempt to secure information to deter-

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[16] Plaintiffs have also asserted a cause of action under 18 U.S.C. § 2520 (1976) for illegal interception of wire communications. *See* note 2 *supra*. Defendants' claim of absolute immunity for violations of federal statutory law certainly can fare no better than their claim for immunity against constitutional torts.

Moreover, defendants can find no aid in the statute itself. It provides: "A good faith reliance on a . . . legislative authorization shall constitute a complete *defense* to any civil . . . action brought under this chapter. . . ." (emphasis supplied) The greatest scope of protection which the defendants could derive from the words of the statute is a qualified, or good faith, immunity. *See Zweibon* v. *Mitchell*, 170 U.S.App. D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

mine whether to initiate a criminal prosecution, then he is entitled to absolute immunity from suit challenging that decision. Without a statement of the district court's analysis, we are unable to determine whether the Attorney General's conduct meets that test. Therefore, we must remand to the district court for additional consideration. In *Burkhart*, the district court initially ruled on the immunity issue by denying defendants' motion to dismiss or, in the alternative, for judgment on the pleadings. The court found it sufficient that the plaintiffs had made allegations that the Attorney General had authorized the wiretaps in the course of supervising an investigation. 397 F.Supp. at 503 n. 4. Later, on a motion for summary judgment, the district court refused to reconsider its earlier decision denying the motion to dismiss on the ground of absolute immunity. 448 F.Supp. at 608 n. 33. The opinion does not disclose, however, whether the court made any inquiry into the circumstances surrounding the authorization. Therefore, we must remand *Burkhart*, as well, to the district court for an initial determination on the availability of absolute immunity in light of the evidence developed.

VI.

Finally, we must deal with the contention of the individual FBI agents that they are entitled to absolute immunity from suit for conducting the electronic surveillances. They argue that they are entitled to absolute immunity from suit derivatively from the absolute immunity accorded to the Attorney General.

Further, they argue that they were merely following the orders of their superior and should not be put to the test of either disobeying authority or being subject to liability.

Their argument is not persuasive. In *Johnson* v. *Alldredge*, 488 F.2d 820 (3d Cir. 1973), *cert. denied*, 419 U.S. 882, 95 S.Ct. 148, 42 L.Ed.2d 122 (1974), this court rejected the concept of derivative absolute immunity. There, we held that a prison warden was absolutely immune from suit.[17] However, we granted the prison guards only qualified immunity, even though they were merely implementing the policies formulated by the warden. *Johnson* again demonstrates that a decision on the scope of immunity depends on the functions performed by the particular official. Derivative absolute immunity would be inconsistent with that approach.

Butz places a heavy burden on the official claiming absolute immunity to demonstrate "exceptional cir-

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[17] We recognize that the primary holding in *Johnson*, that the prison warden was absolutely immune from suit, may no longer be valid. The prison warden had formulated a prison regulation which was held to violate the constitutional rights of the plaintiff. Relying on *Barr* v. *Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), we held that the warden was entitled to absolute immunity because the formulation of regulations was a discretionary act and was within the outer perimeter of his duties. As we discussed above, however, *Butz* teaches that the *Barr* v. *Matteo* test does not apply when the official is charged with constitutional violations. Nevertheless, to determine entitlement to absolute immunity, we analyzed the warden and the guards separately under the *Barr* test. Our implicit rejection of derivative absolute immunity survives *Butz*.

cumstances" which would justify such a high level of protection. The agents have made no attempt to bring themselves within the *Butz* test. They do not claim a common law immunity from suit. Indeed, they concede the well established rule that federal law enforcement officers are entitled only to qualified, or good faith, immunity. The special considerations which lead us to grant absolute immunity to a prosecutor's decision to initiate and present a criminal action are simply not present when a federal law enforcement officer is charged with constitutional violations.

Moreover, we wish to emphasize that we have not left the FBI agents defenseless. If they acted in "good faith" in following the instructions of their superiors, then they will prevail. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *see also Wood* v. *Strickland*, 420 U.S. 308, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1975) (defining "good faith" for purpose of qualified immunity). On the other hand, if they knew or should have known that their actions were violating the plaintiffs' constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty.

VII.

We hold that the Attorney General will be absolutely immune from suit for his decision to authorize the warrantless electronic surveillances only if his decision was made in the performance of a function that is intimately related to the judicial process.

We believe that a determination of the role in which the decision was made may require some inquiry into the circumstances surrounding the decision. As Justice Powell recognized, a prosecutor's quasi-judicial activities are not limited to those which take place in the courtroom. The decision to initiate a criminal prosecution, which we believe includes some limited right to gather information necessary to make that decision, is one such protected function. We are unable to determine from the record whether the district courts in *Forsyth* and *Burkhart* applied the appropriate legal test. Therefore, we must remand both cases to the district courts to conduct any additional inquiry that may be necessary and to apply the test enunciated here. Finally, we hold that the individual FBI agents are not entitled to derivative absolute immunity, and therefore, we will affirm the district courts on that issue.

Each side shall bear its own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1611

KEITH FORSYTH, APPELLEE

v.

RICHARD G. KLEINDIENST, Individually and as Attorney General of the United States, L. PATRICK GRAY, 3RD, Individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE, ALBERT COOPER and DAVID PORTER

JOHN N. MITCHELL, E. DAVIS PORTER, and
ALBERT COOPER, APPELLANTS

(D.C. Civil No. 72-1920)

No. 78-1847

KATHERINE W. BURKHART, JUDITH CHOMSKY, EVA GOLD, DINA PORTNOY, CANDY PUTTER, JOSHUA (JOSH) MARKEL, APPELLEES

v.

WILLIAM SAXBE, Individually and as Attorney General of the United States; CLARENCE KELLEY, Director, Federal Bureau of Investigation; JOHN N. MITCHELL, Individually and as former Attorney General of the United States; JOHN DOE; and RICHARD ROE,

JOHN N. MITCHELL, CLARENCE KELLEY, and WILLIAM SAXBE, APPELLANTS

(D.C. Civil No. 74-0826)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HUNTER and WEIS, *Circuit Judges* and MARKEY, *Chief Judge*, Court of Customs and Patent Appeals *

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* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on February 23, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court filed February 14, 1978 in our No. 78-1611, and March 22, 1978 in our No. 78-1847, be, and the same are hereby affirmed insofar as the issue of derivative absolute immunity is concerned, and the causes be, and the same are hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court. Each side to bear its own costs.

ATTEST:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

May 22, 1979

Certified as a true copy and issued in lieu of a formal mandate on September 5, 1979.

Test: THOMAS F. QUINN
Clerk
United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-1611

KEITH FORSYTH

vs.

RICHARD G. KLEINDIENST, Individually, *et al.* JOHN N. MITCHELL, E. DAVID PORTER, and ALBERT COOPER, APPELLANTS

No. 78-1847

KATHERINE W. BURKHART, *et al.*

vs.

WILLIAM SAXBE, Individually, *et al.* JOHN N. MITCHELL, CLARENCE KELLEY, and WILLIAM SAXBE, APPELLANTS

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM

The petition for rehearing filed by APPELLANTS in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges

of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James Hunter, III
JAMES HUNTER, III
Judge

Dated: August 24, 1979

APPENDIX D

UNITED STATES DISTRICT COURT
E. D. PENNSYLVANIA

Civ. A. No. 72-1920

KEITH FORSYTH

v.

RICHARD G. KLEINDIENST, Individually and as Attorney General of the United States, L. PATRICK GRAY, 3RD, Individually and as Acting Director, Federal Bureau of Investigation, JOHN N. MITCHELL, Individually and as former Attorney General of the United States, JOHN DOE and RICHARD ROE

Feb. 14, 1978

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

Plaintiff, Keith Forsyth, initiated this civil action in 1972 to recover damages in connection with the federal government's electronic interception of telephone conversations, which he claims violated his rights under 18 U.S.C. § 2510-2520 and the First, Fourth and Ninth Amendments of the Constitution of the United States.[1] The defendants remaining in

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[1] The plaintiff had originally alleged a violation of his rights under 47 U.S.C. § 605, but now concedes that he has no cause

this action[2] are former Attorney General of the United States John Mitchell, who authorized the wiretap, and two Federal Bureau of Investigation employees, who intercepted the conversations. The plaintiff bases his cause of action upon the undisputed facts that the wiretap placed upon the telephone of William Davidon was warrantless and without court approval, and that during this surveillance, conversations of the plaintiff were overheard and recorded.[3] Discovery in this case has been completed, although at the defendants' request many of the documents and briefs have been filed with the Court *in camera.* Presently before the Court are cross-motions for summary judgment on the issue of liability. Having heard oral argument, we now determine that both these motions will be denied on the ground that there exists a genuine issue of material fact.

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of action thereunder. He has also agreed that the Sixth Amendment claim asserted in the complaint should be dismissed for failure of proof.

[2] In his complaint the plaintiff had included as defendants former Attorney General Richard Kleindienst and former FBI Director L. Patrick Gray. He has admitted, however, that his claims against them should be dismissed.

[3] The disclosure of this electronic surveillance was made by the United States in response to an 18 U.S.C. § 2520 motion to suppress filed March 15, 1972, in the then pending criminal action *United States* v. *William Anderson,* Criminal No. 602-71 (D.N.J.).

The defendants claim that they are entitled to summary judgment on the basis of the record for the following reasons:

1. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 is not applicable to national security electronic surveillances;

2. *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), should not be applied retroactively to give plaintiff a cause of action;

3. The defendants have an absolute immunity in this action for damages; and

4. The defendants' affirmative good faith defense has been established by the record.

On the other hand, the plaintiff contends that he is entitled to summary judgment on the following grounds:

1. The electronic surveillance in question violated Title VIII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, as well as the Fourth Amendment;

2. *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), should be given retroactive application; and

3. The defendants have no absolute immunity and have failed to establish an affirmative defense of good faith.

Material Facts As To Which There Is No Genuine Issue.

The pleadings, answers to interrogatories and the deposition of former Attorney General Mitchell filed in this case contain the following material facts as to which there does not appear to be a genuine issue.

In June, 1970, the Philadelphia office of the FBI learned from a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to damage underground heating systems in Washington, D.C. to demonstrate its opposition to the war in Vietnam. At that time the FBI was also informed that ECCSL was responsible for several draft board raids. The FBI began an investigation into these alleged activities.

On August 21, 1970, the same person informed the FBI that at least three people, including Professor William Davidon of Haverford College, had discussed the possibility of kidnapping Henry Kissinger. The Government was furnished with copies of letters in which the idea was considered. These letters were written by two members of ECCSL, Father Phillip Berrigan and Sister Elizabeth McAlister. This information was relayed to the Attorney General, Dr. Kissinger and Presidential Assistant John Ehrlichman in a memorandum by FBI Director J. Edgar Hoover on September 4, 1970. The Philadelphia office of the FBI was assigned primary responsibility for the criminal investigation and was directed to prepare a comprehensive report concerning ECCSL.

On October 12, 1970, the Philadelphia office of the FBI requested the Department of Justice to evaluate the report it had prepared "for a prosecutive opinion." At that time the Philadelphia office was "considering electronic surveillance feasibility for William Davidon." On November 13, 1970, a Department of Justice report concluded that there was a "reasonably good prosecutable case against eleven individuals" with respect to the draft board case, but that there was "not sufficient evidence to obtain a conviction" for the conspiracy to kidnap Dr. Kissinger or to damage the utility system in Washington, D.C.

On November 6, 1970, at the request of the FBI, Attorney General Mitchell authorized the wiretap on Davidon that is the subject of this lawsuit. This tap was placed and continued with one extension, until January 6, 1971. The sworn answers of FBI Special Agent Fields reveal that in the view of the Federal Bureau of Investigation, the electronic surveillance upon which plaintiff's conversations were overheard was instituted for the purpose of gathering intelligence-type information under circumstances where it was also anticipated that information of a criminal evidentiary nature might be obtained. He further stated that under the guidelines which had been issued to FBI field offices concerning electronic surveillance authorized by the Attorney General for national security intelligence gathering purposes, monitoring personnel were instructed to monitor and record conversations unless it was known that a particular individual speaking on the surveilled telephone

line was a defendant in a federal criminal case or an attorney for a defendant in a federal case. With respect to the national security electronic surveillance on which plaintiff's conversations were overheard, neither the subject of that surveillance nor other individuals whose conversations were expected to be overheard were defendants or attorneys for defendants in a federal criminal case, and therefore no particular instructions were given the two FBI employees "to minimize the interception of communications not relevant to the alleged purposes for the interceptions." The plaintiff was overheard on three occasions.

A federal grand jury in Harrisburg, Pennsylvania began hearing evidence on December 13, 1970 regarding a plan to destroy underground utility tunnels in Washington, D.C. and to kidnap Dr. Henry Kissinger. In 1971 true bills were found in connection with two indictments, the prosecution of which became known as the trial of the Harrisburg Eight.

The Warrantless Electronic Surveillance In This Case Violated The Fourth Amendment.

Since 1967, when the United States Supreme Court handed down its decision in *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), there has been little doubt that, except for certain well-delineated exceptions,[4] a warrant is necessary for electronic surveillance of criminal activity unre-

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[4] *See, Katz*, 389 U.S. at 357-58, 88 S.Ct. 507.

lated to the national security interest. Furthermore, since 1972 when the Supreme Court decided *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), there has been little doubt that a warrant is also necessary in matters involving the national security interest, except for surveillances based on threats to the national security involving foreign powers.[5] It follows, therefore, that the warrantless electronic surveillance placed on the telephone of William Davidon in November 1970 was unconstitutional. The memorandum by which the Attorney General personally authorized this wiretap claimed that it was necessary to protect the national security interest in connection with the activities of a domestic organization. The Government made no claim that a foreign power was involved. Since *District Court*, there is no question that such a warrantless electronic surveillance is unconstitutional. In this civil action for damages, wherein the plaintiff claims that he was overheard on the warrantless wiretap, the issue presented is whether the plaintiff is entitled to recover monetary damages under either 18 U.S.C. §§ 2510-2520 or the Fourth Amendment.

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[5] *United States* v. *Butenko*, 494 F.2d 593 (3d Cir. (en banc), *cert. denied*, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974). *But see*, *Zweibon* v. *Mitchell*, 170 U.S.App.D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

District Court Should Not Be Given Nonretroactive Application.

The defendants take the position that no liability on plaintiff's Fourth Amendment claim should be imposed in this civil litigation because under *Chevron Oil* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), *District Court* should be given only prospective application.[6] In *Chevron Oil*, the United

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[6] We are not dealing with a criminal case and therefore do not consider Supreme Court decisions in that area. Justice Harlan characterized the Supreme Court's application of the nonretroactivity doctrine in criminal cases in *Desist* v. *United States*, 394 U.S. 244, 256-57, 89 S.Ct. 1030, 1038, 22 L.Ed.2d 248 (1969) (dissenting opinion):

> In the four short years since we embraced the notion that our constitutional decisions in criminal cases need not be retroactively applied, *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), we have created an extraordinary collection of rules to govern the application of that principle. We have held that certain 'new' rules are to be applied to all cases then subject to direct review, *Linkletter* v. *Walker, supra; Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); certain others are to be applied to all those cases in which trials have not yet commenced, *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, *Fuller* v. *Alaska*, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968); and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred. *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *De Stefano* v. *Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968).

States Supreme Court set out the criteria for deciding when a decision should be given nonretroactive application in a civil case:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter* v. *Walker*, *supra*, 381 U.S. at 629, 85 S.Ct. 1731. Finally, we [must] weigh the inequity, imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by holding of non-retroactivity." *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969). *Id.* at 106-07, 92 S.Ct. at 355.[7]

As to whether *District Court* overruled a "clear past precedent," we find that prior to *District Court*, there was no clear rule of law which would have authorized the warrantless electronic surveillance in the instant case. Thus, *District Court* did not overrule

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[7] For an excellent discussion of this portion of *Chevron Oil*, see Judge Gibbons' analysis in *Kacher* v. *Pittsburgh Nat'l Bank*, 545 F.2d 842, 849-52 (3d Cir. 1976) (dissenting opinion).

any clear past precedent. Whether *District Court* decided "an issue of first impression whose resolution was not clearly foreshadowed" in November 1970 when the wiretap in this case was placed, presents a more difficult question. Prior to the decision in *District Court* in June 1972, several federal courts had been presented with the precise question decided in *District Court*, but they had reached divergent conclusions. On one hand, Judge Hoffman held in *United States* v. *Dellinger*, 69 CR 180 at 20 (N.D.Ill. Feb. 20, 1970):

> because the matter of when electronic surveillance is reasonably necessary to investigations carried out to protect the national security is a matter not suitable for a judicial determination, but is rather best left to the authorization of the President or his chief legal officer, the Attorney General, I conclude that *electronic surveillance in national security cases is not subject to the warrant requirements* of the Fourth Amendment. (emphasis added).

And Chief Judge Stanley of the District of Kansas stated on the record in *United States* v. *O'Neal*, KC-CR-1204 on September 1, 1970:

> all of the [warrantless] interceptions, the wiretaps, in this case, . . . *were legally obtained within the inherent constitutional power of the President* because of his responsibility to gather intelligence information having to do with matters vital to national security . . . (emphasis added).

On the other hand, Judge Ferguson stated in *United States* v. *Smith*, 321 F.Supp. 424, 429 (C.D.

Cal. 1971), on January 8, 1971, just two days after the Davidon tap was removed:

> [t]his court is forced to conclude that in wholly domestic situations *there is no national security exemption from the warrant requirement* of the Fourth Amendment. (emphasis added).

Shortly thereafter, the district court judge in *District Court* stated in response to the Government's claim that the President, acting through the Attorney General, is clothed with the power to authorize warrantless wiretaps for domestic security purposes:

> [i]n the opinion of this Court, the position of the Attorney General is untenable. *It is supported neither historically, nor by the language of the Omnibus Crime Act.* Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today. *United States* v. *Sinclair*, 321 F.Supp. 1074, 1079 (D.Mich.1971), *aff'd sub nom. United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (emphasis added).

The most relevant Supreme Court case prior to *District Court* was *Katz*, wherein the Court made it clear that a warrant was necessary for all types (even nontrespassory) of electronic surveillance of criminal activity unrelated to the national security interest. In *Katz*, Justice Stewart stated in the majority opinion:

> [w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth

> Amendment in a situation involving the national security is a question not presented by this case. 389 U.S. at 359 n. 23, 88 S.Ct. at 515.

Although six other Justices agreed with the decision of the Court, three felt compelled to write concurring opinions in order to express their views on this issue. Justice White wrote:

> [w]e should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, has considered the requirements of national security and authorized electronic surveillance as reasonable. *Id.* at 364, 88 S.Ct. at 518.

Justice Douglas, with Justice Brennan joining, wrote:

> [n]either the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like petitioner, [we] cannot agree that where spies and saboteurs are

> involved adequate protection of the Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate. *Id.* at 359-60, 88 S.Ct. at 516.

In view of our determination in connection with the second and third criteria for nonretroactivity, we do not find it necessary to decide the question of whether *District Court* decided "an issue of first impression whose resolution was not clearly foreshadowed" in 1970.[8]

The second criterion for nonretroactivity set forth in *Chevron Oil* is whether application will further or retard the purpose of the ruling. The purpose of the rule enunciated in *District Court* was to protect people from unwarranted intrusions into their privacy by the administrative arm of their government. Denying nonretroactivity will not retard, but should encourage vigilance and solicitude for the Fourth Amendment rights of persons, particularly in close cases.

The third and final criterion for nonretroactivity in *Chevron Oil* is whether there will be injustice or hardship to the parties. In this case, as we hereinafter determine, the defendants will be afforded an opportunity to establish a good faith defense. Obvi-

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[8] The use of warrantless electronic surveillance by previous Presidents and Attorneys General is discussed in *District Court, supra,* 407 U.S. at 310, 92 S.Ct. 2125 and in *Zweibon,* 170 U.S.App.D.C. at 23, 516 F.2d at 616.

ously, retroactive application is not inequitable to the plaintiff. Thus, none of the parties will suffer an unjust hardship if *District Court* is retroactively applied. In view of our determination that the second and third criteria of *Chevron Oil* have not been met, we conclude that the record in this civil case does not support a holding of nonretroactivity pursuant to *Chevron Oil.*[9]

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[9] Nonretroactive application of new Fourth Amendment doctrines is frequently mandated in criminal cases. *See, e.g., Desist* v. *United States,* 394 U.S. 244, 247-48, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). Nevertheless, *District Court* was not given nonretroactive application when the electronic surveillance at issue in this case was challenged in the criminal trial of *United States* v. *Ahmad,* 335 F.Supp. 1198, 1200 (M.D.Pa. 1971), wherein Judge Herman ruled the wiretap illegal under *District Court,* and, therefore, ordered the fruits of the surveillance suppressed. Furthermore, the Third Circuit, when presented with these determinations, stated, 499 F.2d 851, 853 n. 2 (3d Cir. 1974):

> Judge R. Dixon Herman, who presided over the [Harrisburg Eight] case, found that there had been an unauthorized and illegal wiretap.[2]

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[2] The electronic surveillance apparently had been performed without a court order in accordance with a Presidential determination that national security was involved. Judge Herman relied on the decision of the Court of Appeals in *United States* v. *United States District Court,* 444 F.2d 651 (6th Cir. 1971), later affirmed by the United States Supreme Court at 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) in deciding that the wiretap was illegal.

The Electronic Surveillance In This Case Is Subject To The Procedures And Remedies Of 18 U.S.C. §§ 2510-2520.

The defendants contend that the national security electronics surveillance in this case does not violate any of the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. The basis of their contention is that § 2511(3) of the Act exempts electronic surveillances conducted for national security purposes. Section 2511(3) provides:

> (3) Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necesary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. . . .

The United States Supreme Court stated in *District Court* that the purpose of § 2511(3) was to "provide that the Act shall not be interpreted to limit or disturb such power as the President may have under the

Constitution. In short, Congress simply left presidential powers where it found them." 407 U.S. at 303, 92 S.Ct. at 2130.

The question as to whether electronic surveillance for national security purposes became subject in 1968 to the procedures and remedies of 18 U.S.C. §§ 2510-2520 was determined by the District of Columbia Circuit in *Zweibon* v. *Mitchell*, 170 U.S.App. D.C. 1, 516 F.2d 597 (1975) (en banc), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). In an opinion for the plurality by Judge Wright, the court held that electronic surveillance of the type involved in the instant case is subject to both the procedures and the remedies provided by the Act.[10] In his opinion Judge Wright reasoned:

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[10] Judge Wright described the responsibility of the judiciary in the area of electronic surveillance for "national security" as follows:

> Undoubtedly the President, our Chief Executive and Commander-in-Chief of our Armed Forces, is imbued by the Constitution with vast and indispensable powers for dealing with the vital problems generated by our relations with foreign powers, including the duty to protect this country from foreign aggression or subversion. The very existence of such tremendous power, however, renders it susceptible to abuse and endangers those fundamental personal liberties which the Government was instituted to secure for its citizens and whose exercise elevates the nation to a statute worthy of defense. Thus, although the attempt to claim Executive prerogatives or infringe liberty in the name of security and order may be motivated by the highest of ideals, the judiciary must remain vigilantly prepared to fulfill its own responsibility to channel Executive action within constitutional bounds. 170 U.S.App.D.C. at 8-9, 516 F.2d at 604-05 (footnotes omitted).

Since we do not believe the [*District Court*] case held the standards and procedures of Title III to be inapplicable when a purported national security surveillance is involved, we must look to the language and legislative history of Section 2511(3) to determine congressional intent in its enactment. Section 2511(1) unequivocally declares that '[e]xcept as specifically provided in this chapter,' interception of '*any* wire or oral communication' is illegal. Section 2511(3), however, only states that '[n]othing contained in this chapter * * * shall limit the *constitutional* power of the President' to take the actions he deems necessary in the field of national security. Since Section 2511(3) is merely a disclaimer that 'constitutional' actions by the President are not to be invalidated under the statute, it is reasonable to assume that Congress intended to prohibit 'unconstitutional' Executive surveillance, which would therefore be 'in violation of this chapter' within the comprehension of the damages provision of Title III. Thus, even if the *procedures* of Title III were inapplicable to national security wiretapping, the *remedies* of Title III should apply to *unconstitutional* exercises of presidential power.

An analysis of the legislative history of Title III also indicates that it would be reasonable to interpret Section 2511(3) as a statement that the question reserved in *Katz* should be left for judicial resolution, but that, *to the extent the President does not have the constitutional power to engage in warrantless surveillance activities, the procedures and remedies of Title III are fully operative.* This interpretation is fully consistent

> with the [*District Court*] Court's understanding of the legislative history of Section 2511(3) and the two-decade struggle in Congress concerning wiretap legislation.

Id. at 67-68, 516 F.2d at 663-64 (emphasis supplied in part). *Accord, Kinoy* v. *Mitchell,* 331 F.Supp. 379, 382 (S.D.N.Y. 1971).

We agree with *Zweibon* that the procedures and remedies of Title III apply to all electronic surveillance which must, by virtue of the Fourth Amendment, be conducted pursuant to a warrant. Since, as we have heretofore pointed out, a warrant was constitutionally required under the circumstances of this case, it would appear that the remedies provided in Title III should be made available to the plaintiff, unless the defendants establish an affirmative good faith defense, as hereinafter discussed.[11]

The Defendants Are Limited To An Affirmative Good Defense.

The defendants seek to avoid liability by asserting that they have an absolute immunity from suit for discretionary acts done within the scope of their authority because they are high ranking government officials. They contend that this is the law in the Third Circuit and cite three pre-1975 cases: *Skehan* v.

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[11] Although it does not appear that the defendants are contending that the nonretroactivity doctrine of *Chevron Oil* should be applied to nullify the effect of Title III in this case, it is nevertheless our opinion that the reasons hereinbefore stated for the retroactive application of *District Court* would likewise be applicable here.

Board of Trustees of Bloomsburg State College, 501 F.2d 31, 43 (3d Cir. 1974), *vacated*, 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 474 (1975); *Fidtler* v. *Rundle*, 497 F.2d 794, 802 (3d Cir. 1974); and *Johnson* v. *Alldredge*, 488 F.2d 820, 824 (1974). However, as the Third Circuit stated in *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F2d 53, 59-60 (3d Cir.) (en banc), *cert. denied*, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1976):

> [u]pon . . . consideration we conclude that *Wood* v. *Strickland* [420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975)] significantly modified the law of immunity upon which we relied in affirming the district court . . . . It was our view [then] that if the government officials performing discretionary government duties acted within the scope of their official responsibilities, they were immune from damage actions . . . .
>
> *Wood* v. *Strickland, supra*, demonstrates that we erred in assuming that there still existed an unqualified, common law immunity covering non-judicial . . . government officials performing adjudicatory functions.

It therefore appears that government officials, even high ranking government officials such as the Attorney General of the United States, no longer have available to them the defense of absolute immunity on the ground that they were performing discretionary duties within the scope of their official responsibilities.

We must determine, however, whether the Attorney General, who, next to the President, is our na-

tion's highest executive officer directly responsible for the administration of justice, is entitled to an absolute immunity in connection with his authorization of the unconstitutional electronic surveillance in this case. Fortunately *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) provides some guidance for the resolution of this issue. In *Imbler*, the United States Supreme Court decided that a state prosecuting attorney who acted within the scope of his duties by initiating and pursuing a criminal prosecution was entitled to absolute immunity. In arriving at its determination that a prosecutor does have absolute immunity in the performance of acts "intimately associated with the judicial phase of the criminal process," the Court placed reliance upon *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927), in which absolute immunity was granted to a special assistant to the Attorney General of the United States in connection with an action of malicious prosecution based on an indictment and prosecution. In delineating the boundaries of its holding, however, the Court stated:

> [w]e agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative of-

> ficer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983. 424 U.S. at 430, 96 S.Ct. at 995.

Here we are concerned with actions of the Attorney General in authorizing a warrantless wiretap. As the *Imbler* Court stated in a footnote:

> [p]reparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them. *Id.* at 431 n. 33, 96 S.Ct. at 995 n. 33.

It is therefore our opinion that in authorizing the warrantless wiretap in this case, the Attorney General was functioning as an administrator rather than as an officer of the court. We must conclude that the Attorney General is not entitled to absolute immunity in connection with this warrantless electronic surveillance.

The Defendants May Assert A Good Faith Affirmative Defense To Plaintiff's Fourth Amendment Claim.

In *Zweibon*, decided prior to the Supreme Court's pronouncements in *Imbler*, the District of Columbia Circuit Court determined that in a civil action for

damages, the Attorney General was entitled to assert a good faith defense in connection with his authorization of a warrantless wiretap.[12] We shall follow the lead of our learned colleague, Judge VanArtsdalen, in *Burkhart* v. *Saxbe*, 397 F.Supp. 499, 502 (E.D.Pa.1975) and hold that the Attorney General and the two FBI agents, the defendants who remain in this case, are permitted a good faith defense to the plaintiff's Fourth Amendment claim. The burden is therefore on the defendants, as stated in *Skehan*, to come forward and convince the trier of fact by a preponderance of the evidence that (1) they did not know and reasonably need not have known that their actions would constitute a violation of plaintiff's constitutional rights; and (2) they acted without a malicious intention to deprive the plaintiff of his constitutional rights or cause him to suffer other injury.

The Defendants May Assert A Good Faith Affirmative Defense To Plaintiff's Statutory Claim.

We are also presented with the question whether there is any defense available to the defendants in connection with the plaintiff's claim for damages pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. *Zweibon* is the only case specifically discussing this issue which has been called to our attention. In *Zweibon*, after holding that the electronic surveil-

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[12] *See also, Halperin* v. *Kissinger*, 424 F.Supp. 838, 842, 844 n. 8, 845 (D.D.C. 1976); *Hallinan* v. *Mitchell*, 418 F.Supp. 1056, 1057 (N.D.Cal. 1976).

lance authorized in 1970 by the Attorney General without a court order was illegal, the court concluded that Congress intended that the defendants should have a good faith defense to the statutory claim, although § 2520 of Title 18 specifically provides:

> A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.[13]

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[13] Title 18 U.S.C. § 2518(7) provides:

> Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—
>
> (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
>
> (b) there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

In accordance with *Zweibon*, we hold that the defendants shall have the opportunity to present the same good faith defense to the plaintiff's statutory claim, as heretofore set forth from the *Skehan* decision.

A Genuine Issue Of Material Fact Exists.

The defendants urge this Court to enter summary judgment in their favor. It is their position that the record establishes their good faith affirmative defense. Other than the pleadings and briefs, the only documents which have been filed are defendants' answers to interrogatories and the deposition of John Mitchell. The plaintiff opposes this motion, but has filed no affidavits or depositions. As heretofore determined, the defendants have the burden of establishing by a preponderance of the evidence that (1) they did not know and reasonably need not have known that conducting the warrantless wiretap in this case was unconstitutional; and (2) they acted without malicious intention to (a) deprive the plaintiff of his constitutional rights or (b) cause him to suffer other injury. *Skehan, supra.*

In connection with the defendant's motion for summary judgment, the law is clear that the defendants have the burden of demonstrating that there is no genuine issue of material fact. *Fairbanks, Morse & Co.* v. *Consolidated Fisheries Co.*, 190 F.2d 817, 824 (3d Cir. 1951), quoted with approval in *Ettinger* v. *Johnson*, 556 F.2d 692, 696 (3d Cir. 1977). Moreover, in considering the motion for summary judg-

ment, the Court must view the evidence in a light most favorable to the party opposing the motion. *Goodman* v. *Mead Johnson & Company*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977). In considering the evidence contained in the deposition of John Mitchell and the defendants' answers to interrogatories in a light most favorable to the plaintiff, it is apparent that there are genuine issues of material fact concerning the good faith defense of the defendants. As the Third Circuit in *GAF* v. *Amchem Products, Inc.*, 570 F.2d 457 at 461 (3d Cir. 1978) pointed out: "[a] factfinder might draw a different inference, but on a motion for summary judgment the inference favorable to [the party opposing the motion] must prevail." Furthermore, as stated in *Toebelman* v. *Missouri-Kansas Pipe Line Company*, 130 F.2d 1016, 1018 (3d Cir. 1974), "[t]he evidence contradicting or impeaching that of the movant . . . may appear in the movant's own evidentiary materials." Finally, Wright & Miller, *Federal Practice & Procedure* § 2712, at 278-82 (1973), quoted with approval in *Rosenthal* v. *Rizzo*, 555 F.2d 390, 393 (3d Cir. 1977), provides: "[a] motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of fact issues."

With respect to the plaintiff's motion for summary judgment, we find that in viewing the evidence in the deposition and answers to interrogatories in a light favorable to the defendants, the plaintiff has

likewise failed to carry his burden of demonstrating that there is no genuine issue of material fact.

Furthermore, after making its determination that the defendants in *Skehan* were entitled to a good faith defense, the Court remanded the case for "findings of fact with respect to the [good faith] immunity of each defendant." Accordingly, an order will be entered denying the parties' cross-motions for summary judgment on the ground that there are genuine issues of material fact in connection with the defendants' affirmative defense of good faith.

APPENDIX E

United States District Court
E. D. Pennsylvania

Civ. A. No. 74-826

KATHERINE W. BURKHART *et al.*

v.

WILLIAM B. SAXBE *et al.*

March 21, 1978

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, District Judge.

Presently before the court are plaintiffs' motion for partial summary judgment and defendants' cross motion for complete summary judgment. Many factual contentions are not disputed, but others will require a fact finder's determination. The procedural posture of the case, however, permits clarification of some of the prevalent legal issues at this stage of the litigation thereby establishing an appropriate foundation for the ultimate disposition of the controversy. Rule 56(d), Federal Rules of Civil Procedure.

I.

A. *Factual Background*

This case arises indirectly from a series of criminal and civil cases which were generated by the

social turbulence of the late sixties and early seventies.[1] During the course of the discovery proceedings in *Philadelphia Resistance* v. *John Mitchell*, C.A. 71-1738 (E.D.Pa.), the parties ascertained that certain of the plaintiffs' telephone conversations were overheard by agents of the Federal Bureau of Investigation (FBI) who were at the time monitoring certain wiretaps[2] placed pursuant to authorization by the then Attorney General of the United States, John Mitchell.[3] No prior court authorization for the wiretaps was obtained.

The plaintiffs, Burkhart, Chomsky, Gold, Portnoy and Putter were overheard during the course of the electronic surveillance of the telephone registered to one William Davidon (the Davidon tap) who was sus-

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[1] The criminal and civil litigation which forms the historical background to this present action is documented in the following opinions: *Burkhart* v. *Saxbe*, 397 F.Supp. 499 (E.D. Pa. 1975); *Philadelphia Resistance* v. *Mitchell*, 63 F.R.D. 125 (E.D. Pa. 1972); *Philadelphia Resistance* v. *Mitchell*, 58 F.R.D. 139 (E.D. Pa. 1972). *See also, United States* v. *Ahmad*, 347 F.Supp. 912 (M.D. Pa. 1972), *modified sub nom. United States* v. *Berrigan*, 482 F.2d 171 (3d Cir. 1973); *United States* v. *Ahmad*, 335 F.Supp. 1198 (M.D. Pa. 1971); *United States* v. *Ahmad*, 329 F.Supp. 292 (M.D. Pa. 1971); *United States* v. *Ahmad*, 53 F.R.D. 194 (M.D. Pa. 1971).

[2] There are two companion cases which also resulted from these wiretaps and which raise identical legal issues. *Forsyth* v. *Kleindienst*, 447 F.Supp. 192, C.A. 72 1920 (E.D. Pa.); *McAlister* v. *Kleindienst*, C.A. 72 (1977 (E.D. Pa.).

[3] John Mitchell was Attorney General from January 20, 1969 to March 2, 1972. William Saxbe was Attorney General from January 4, 1974 to February 3, 1975. Clarence Kelly has been director of the FBI since July 9, 1973.

pected of being an active member of an organization known as the East Coast Conspiracy to Save Lives (ECCSL). The plaintiffs, Gold, Portnoy and Markel [4] were overheard during the course of the electronic surveillance of the telephone registered to the Philadelphia chapter of the Black Panther Party (the Black Panther tap).

Pursuant to information compiled through the investigative processes of the FBI and furnished to the United States Department of Justice, Attorney General Mitchell authorized the FBI to initiate and conduct, without a warrant or prior judicial approval, the two wiretaps at issue in this case. The Black Panther tap was originally authorized on June 1, 1970 and reauthorized on June 25, 1970, August 15, 1970, September 22, 1970, November 11, 1970 and finally terminated on February 10, 1971.[5] The Davidon tap was authorized on November 6, 1970, reauthorized on December 7, 1970 and terminated on January 6, 1971.[6]

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[4] The plaintiff, Markel, was added to this lawsuit by stipulation of the parties dated, March 22, 1976. The suit was originally filed on April 1, 1974.

[5] The surveillance was actually conducted during the following time periods: July 13, 1970 to July 14, 1970; August 25, 1970 to November 10, 1970; November 23, 1970 to January 11, 1971; January 16, 1971 to February 10, 1971. Certain of the reauthorizations were necessitated by the fact that the phone service was discontinued and the headquarters moved to a new location and thereafter reinstated when the headquarters returned to the original site.

[6] The surveillance was actually conducted from November 24, 1970 to January 6, 1971.

The plaintiffs were admitedly not the targets of these investigations and a review of the logs of these taps containing plaintiffs' conversations suggest that the information contained therein was not relevant to the claimed purpose of the surveillance.

The plaintiffs claim that these warrantless wiretaps violated their fourth amendment right to be secure against unreasonable searches and seizures as well as the provisions of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520. The defendants respond, *inter alia*, on the grounds that the wiretaps were authorized by the Attorney General for national security purposes and therefore were exempt from the provisions of Title III, and did not require prior judicial approval. Defendants further assert they are clothed with official immunity.

B. *Legal background*

A determination of whether the defendants' conduct was unlawful, and, even if unlawful, whether they are nonetheless immune from liability by reason of a good faith, reasonable belief that such action was not unlawful, requires an historical analysis of the state of the law during the period in question.

In 1967, the Supreme Court decided two major cases that established the limitations imposed by the fourth amendment upon the use of electronic and other technologically sophisticated listening devices by law enforcement officers in conducting investigations. The first case was *Berger* v. *New York*, 388 U.S. 41,

87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); the second, *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In *Berger*, the petitioner was convicted of a conspiracy to bribe state officials. Agents of the district attorney's office had obtained a court authorization to plant an electronic listening device (a "bug") in the offices of two suspected co-conspirators. The authorization was based on a New York statute, § 813-a of the New York Code of Criminal Procedure. The overheard conversations were received in evidence at trial, over objection. In holding the New York statute invalid because of its overbreadth, the court ruled that authorization to conduct an unconsented entry upon another's property in order to gather evidence through a surreptitiously placed listening device, may be granted only under the "most precise and discriminate circumstances." *Berger, supra*, 388 U.S. at 56-57, 87 S.Ct. at 1882. The court set forth general guidelines. There must be a satisfactory showing of a particularized need for such surveillance, and of the specific type of information sought. *Id.* The authorization should describe with particularity the type of conversations to be overheard so as to allow the officers conducting the surveillance to ascertain when the objective has been satisfied. The authorization must be limited in time and scope, in order to protect against unlimited interference with the suspects' rights of privacy. When the objective is obtained, the surveillance must be promptly terminated. Upon completion of the surveillance, a return should be made to the

authorizing official detailing the carrying out of the authorization and specifying the conversations overheard or otherwise seized. A state may not authorize an intrusive surveillance "until it has reason to believe that a specific crime has been or is being committed." *Id.* at 59, 87 S.Ct. at 1883.

Katz v. *United States*, *supra*, held that the fourth amendment protected against warrantless nontrespassory wiretaps as violative of a person's right of privacy. *Katz* involved a wiretap placed upon a public telephone. The Supreme Court ruled that the exclusionary rule precluded use of the overheard conversations at trial. *Katz* thus overruled the long standing rule of *Olmstead* v. *United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), that nontrespassory wiretapping did not violate the fourth amendment.

Critically relevant to the present case is footnote 23 to the *Katz* opinion, *supra* 389 U.S. at 358-359, S.Ct. at 515, which states:

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving national security is a question not presented by this case.

See also the discussion as to "national security" and "executive branch" wiretaps in the concurring opinions of Justices Douglas and Brennan, *id.* 389 U.S. at 359, 88 S.Ct. 507, and the separate concurring opinion of Justice White, *id.* at 362, 88 S.Ct. 507.

Following the *Berger* and *Katz* decisions, Congress enacted Title III of the Omnibus Crime Control and

Safe Streets Act, 18 U.S.C. §§ 2510-2520.[7] The statute, in substance, prohibits the interception and use or disclosure of wire or oral communications, § 2511, except where it is specifically authorized for the purpose of investigating certain classes of crimes, § 2516, and then only after full compliance with the elaborate procedures specified in § 2518. Aside from criminal penalties, any person whose wire or oral communications are intercepted, disclosed or used in violation of the Act, may recover actual damages in a civil action to be computed at not less than One Hundred Dollars ($100) a day for each day of the violation not to exceed One Thousand Dollars ($1,000), plus any punitive damages and reasonable costs and attorney's fees, § 2520. However, the defendant in any civil or criminal action brought pursuant to this or any other statute prohibiting the interception of wire or oral communications is accorded a complete defense if he acted in good faith reliance upon a court order or legislative authorization, § 2520.

Pervasive as this statute is in the area of electronic surveillance, Congress nonetheless included the following proviso regarding the President's constitutional power to utilize these investigative tools for the purposes of protecting the national security and conducting the nation's affairs, 18 U.S.C. § 2511(3):

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[7] U.S. Code Cong. and Admin. News, pp. 2112, 2113 (90th Cong. 1968), which sets forth the legislative history, suggests that Title III was enacted in response to the decisions in *Berger* and *Katz* which radically changed the law relevant to governmental electronic eavesdropping.

> Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

In the years following the *Berger* and *Katz* decisions and the enactment of Title III, the President, through his delegate, the Attorney General, continued the earlier prevalent practice of authorizing warrantless electronic surveillance where he deemed such necessary or appropriate to secure the nation against internal or external threats.[8] During this period the

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[8] The Supreme Court recognized in *United States* v. *United States District Court*, 407 U.S. 297, 310-311 n. 10, 92 S.Ct. 2125, 33 L.Ed.2d 752 and the defendants have alleged and

warrantless wiretaps at the center of this litigation were authorized by the Attorney General and conducted by the defendants ostensibly for "national security."

The issue expressly left unanswered in the *Katz* decision, and further complicated by Congress's enactment of the proviso embodied in 18 U.S.C. § 2511 (3) upon which defendant Mitchell relied in continuing the practice established by his predecessors,[9] finally reached the Supreme Court in *United States* v. *United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (hereinafter *Keith*). The case involved a criminal prosecution in which one of the defendants, charged with conspiracy to destroy government property, namely, the offices of the Central Intelligence Agency, had been the subject of electronic surveillance. The government filed an affidavit which stated, essentially, that the wiretap had been conducted without prior judicial ap-

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argued throughout this litigation, that successive Presidents since 1940 have authorized the use of electronic surveillance for national security purposes. President Roosevelt authorized Attorney General Jackson to conduct wiretapping in situations involving a foreign threat to this nation and Attorney Generals Tom Clark and Herbert Brownell advised and urged Presidents Truman and Eisenhower, respectively, of the necessity for electronic surveillance in internal security matters. *See United States* v. *United States District Court*, 444 F.2d 651 (6th Cir. 1971) (Appendix), *aff'd.* 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).

[9] *See* Affidavit of John N. Mitchell attached to defendants' motion for summary judgment and depositions dated October 23, 1975 and October 14, 1976.

proval, to gather information necessary to protect the nation from certain domestic security threats. The district court,[10] reviewing the logs of the interceptions, *in camera*, determined that the wiretaps violated the fourth amendment and ordered the government to fully disclose the contents of those logs to the defendant as required by *Alderman* v. *United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).[11] The Court of Appeals for the Sixth Circuit [12] refused to issue a writ of mandamus and upheld the district court's order requiring full disclosure of the overheard conversations.

The government's position was essentially that the wiretaps in question were authorized by the Attorney General pursuant to the President's constitutional power to protect the national security from threats by domestic organizations and did not require prior judicial approval. The government relied upon the President's constitutional duty to protect the nation, U.S.Const., Art. II, § 1, contending that warrantless

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[10] *United States* v. *Sinclair*, 321 F.Supp. 1074 (E.D. Mich. 1971).

[11] *Alderman* requires the government to disclose to a defendant, charged with a criminal offense, any conversations in which he participated or which were conducted on his premises and which were overheard by the government during the course of an illegal surveillance. The purpose of this required disclosure is to afford the defendant a fair hearing to determine whether the illegal surveillance tainted any other evidence produced during the criminal prosecution.

[12] *United States* v. *United States District Court*, 444 F.2d 651 (6th Cir. 1971).

wiretaps were historically recognized by prior administrations and expressly recognized by Congress in adopting 18 U.S.C. § 2511(3).

Confronted with the issue left open in *Katz*, the Supreme Court rejected the government's claim that electronic surveillance for domestic national security purposes was outside the protective umbrella of the fourth amendment. In so doing, the Court interpreted the language of § 2511(3) as an expression of Congress's neutral position with regard to whether the President is constitutionally endowed with the power to eavesdrop, without prior judicial approval, on persons who are deemed by the President to constitute a threat to the nation's security. Having determined that Title III constituted neither a recognition nor limitation on whatever constitutional power the President may enjoy to authorize and conduct such surveillance, the remaining question was to determine the appropriate boundaries, if any, of such power.

Reciting the depth and characteristics of the fourth amendment as construed over the course of almost two centuries, the Court, applying a balancing test, held that the potential danger posed to the individual's right to be free from unwarranted and unreasonable searches and seizures, outweighed the government's need to conduct warrantless electronic surveillances in protecting domestic security. Considering that domestic national security cases often involve first as well as fourth amendment values, the Court determined that prior judicial approval in the form of a warrant issued upon a proper showing

by the government does not place an undue burden upon the government's duty to protect the nation's security from domestic subversion. The Court also rejected the government's contentions that a judicial officer would be unable to assimilate and comprehend the numerous complex and subtle factors necessary to determine whether a national security threat exists and that disclosure of such confidential information would substantially increase the danger to the national security and the lives of those individuals involved in its protection. The Court expressly limited the decision to domestic security surveillance leaving unanswered the scope of the President's power to conduct electronic surveillance where the threat to national security emanates from a foreign source.[13] *Keith*, 407 U.S. at 308, 92 S.Ct. 2125. This question, however, has been confronted by both the Court of Appeals for the Third Circuit and the District of Columbia.

In *United States* v. *Butenko*, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974), the court was compelled to decide the legality of a warrantless surveillance

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[13] There is no clear line of demarcation between domestic and foreign security threats. As the court recognized,

> No doubt there are cases where it will be difficult to distinguish between "domestic" and "foreign" unlawful activities directed against the government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers.

Keith, 407 U.S. at 309, n. 8, 92 S.Ct. at 2133.

in the context of an *Alderman* proceeding.[14] The defendant was prosecuted for communicating information relating to the national defense to a foreign government and the electronic surveillance was considered necessary to protect against a foreign threat. The court held that *prior* judicial approval was unnecessary to comport with the fourth amendment requirements, where the purpose of the wiretap is solely to protect against threats to our national security emanating from foreign sources. *Id.* at 605.

The Court of Appeals for the District of Columbia Circuit, in a civil suit for damages,[15] held that even where the wiretap was installed to gather information necessary to protect this country's relations with a foreign government, the tap, nonetheless, constituted surveillance of a domestic organization and, therefore, came within the controlling doctrine of the *Keith* decision requiring the government to first obtain a judicial warrant before proceeding with the surveillance. *Zweibon* v. *Mitchell*, 170 U.S. App.D.C. 1, 516 F.2d 594 (1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).[16]

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[14] *See* note 11, *supra*.

[15] The suit was instituted by the Jewish Defense League (JDL) to recover damages for the alleged violations of their civil rights as a result of the government's wiretapping their phones without a warrant. The defendants claimed that the surveillance was necessary because officials of the Soviet Union had expressed serious concern as a result of certain public threats of violence aimed against them by members of the JDL.

[16] *Zweibon*, unlike *Keith* and *Butenko*, confronted the question of warrantless national security wiretapping in the context of civil litigation and was therefore compelled to consider

II.

A. *National Security.*

Was the electronic surveillance conducted in this case for the purpose of investigating perceived threats to this nation's security? If, as the plaintiffs' urge, these wiretaps were solely for the purpose of gathering evidence to support a criminal prosecution and/or for the purpose of political harassment and intimidation, then the defendants' conduct in authorizing and conducting this surveillance, without full compliance with the provisions of 18 U.S.C. § 2518 would be actionable under 18 U.S.C. § 2520 as well as the fourth amendment. *See Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). On the other hand, if the purpose of the surveillance was to protect against a perceived threat to national security, it becomes necessary to reach the question of whether the defendants' actions were violative of either Title III or the fourth amendment. Finally, even if violative of Title III or the fourth amendment, are defendants nonetheless immune from liability?

Both parties have propounded extended arguments on the standard this court should apply in evaluating the Attorney General's assertion that the surveillance was necessary for national security purposes. The

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the defendants' claim of immunity as well as the appropriate remedy to be applied in the event liability were to be imposed. The case is procedurally analogous to the present litigation.

threshold question on a motion for summary judgment is whether this issue presents a disputed factual question material to the litigation. It seems clear that the question of whether the surveillance was conducted for national security purposes is factual and is material to the ultimate resolution of the litigation.[17] *But cf. Rosenthal* v. *Rizzo*, 555 F.2d 390 (3d Cir.) (Aldisert, J. dissenting), *cert. denied*, 434 U.S. 892, 98 S.Ct. 268, 54 L.Ed.2d 178 (1977). I need not reiterate the proper analysis to be employed by the court in considering a motion for summary judgment. *See Ettinger* v. *Johnson*, 556 F.2d 692, 696-697 (3d Cir. 1977). In this case there is a genuine dispute as to the existence of a national security

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[17] Viewing this as a factual question raises certain problems in the context of civil litigation. In its criminal counterpart, validity of the government's claim is determined by the court either in the context of a pre-search judicial review to determine probable cause or a post search *Alderman* proceeding. If it were necessary to submit this factual question to a jury, the government's contentions in *Keith* as to the complexity of the underlying information and the risk inherent in the increased exposure of this confidential information would warrant careful consideration. The suggestions in *Keith* for eliminating these problems ranging from *in camera* submission of the confidential information to the designation of a special court capable of assimilating and comprehending the information would, of course, be unavailable in a civil trial. None of the cases involving civil litigation of this nature have expressly confronted this problem. *See Zweibon*, 516 F.2d at 607-611; *Halperin* v. *Kissinger*, 424 F.Supp. 838 (D.D.C. 1976); *Hallinan* v. *Mitchell*, 418 F.Supp. 1056 (N.D. Cal. 1976); *Sinclair* v. *Kleindienst*, C.A. 610-73 (D.D.C., filed Sept. 23, 1977) (unpublished).

predicate for the authorization of these particular wiretaps.

The deposition of John Mitchell (dated October 23, 1975), supported by the exhibits attached to defendants' answers to plaintiffs' interrogatories, establishes that the FBI had developed information pertaining to certain activities of the ECCSL and that this information formed the basis for Mitchell's conclusion that the nation's security was being threatened and that electronic surveillance would be helpful in minimizing that danger.

The information was developed during the course of investigating the burglary of certain draft board and FBI field offices in 1970. Through the use of an informant, the FBI uncovered what appeared to be a plot by suspected members of the ECCSL to kidnap Henry Kissinger, then National Security Advisor to the President, and simultaneously destroy the heating systems of certain federal buildings located in Washington, D.C.[18] In addition, the FBI furnished Mitchell with background information concerning the activities of William Davidon and the basis for its conclusion that he was an active member and central figure in the ECCSL. Based on this information, Mitchell approved the FBI's request to place a wiretap on Davidon's residence telephone.

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[18] This plan was discussed in correspondence between Father Philip Berrigan and Sister Elizabeth McAlister, self-proclaimed leaders of the anti-Vietnam war movement during this period. The letters are partially reprinted in *United States* v. *Berrigan*, 482 F.2d at 177-179.

The plaintiffs argue that the primary purpose of this tap was to gather evidence to support a criminal prosecution against members of the ECCSL in order to suppress their criticism of the government's Vietnam policy. They urge that because the primary purpose was for a criminal investigation, the defendants' claim of national security should be rejected.

It may well be that one of the purposes and certainly one of the possible results of this investigation was ultimately to prosecute those individuals involved in the alleged conspiracy; nonetheless, that alone would not alter the fact that there may have been a bona fide threat to the national security. No doubt one of the most effective means of halting subversive activity aimed at the violent disruption of the government is to criminally prosecute those involved in such unlawful activity. However, simply because the preceived threat to the nation may result in the prosecution of those from whom the threat emanates does not require that the government's national security claim be rejected.

In this instance, the intended victim of the kidnap plot was the President's senior national security advisor, who was engaged at that time in high level, extremely sensitive negotiations with North Vietnam, a hostile foreign government. It would be ludicrous to suggest that because the plot to kidnap that official constituted a violation of federal law, the national security purpose for conducting the surveilliance was either nonexistent or irrelevant. *See Zweibon*, 516 F.2d at 612 n. 39.

The basis for authorization of the Black Panther tap is fully set forth in the affidavit of John Mitchell attached to the defendants' motion for summary judgment and the exhibits referred to therein. The affidavit states, *inter alia:*

> Pursuant to the above described authority, and as indicated in Exhibits B, C, D, E, and F previously filed herein in connection with Defendants' Answers *In Camera* to Plaintiffs' Interrogatories to Defendants, I authorized warrantless electronic (telephone) surveillance on the offices of the Black Panther Party in Philadelphia, Pennsylvania, which appeared to be the headquarters of that organization for the state of Pennsylvania. I initially approved that surveillance on June 1, 1970, deeming it necessary for the collection of intelligence information to protect the functions and structure of the Government and the security of the Nation because: (a) the Black Panther Party had repeatedly advocated the violent overthrow of the Government of the United States and had made persistent and serious threats in that regard; (b) the Black Panther Party had affiliated groups or chapters in 39 major cities in the United States and an organizational mechanism for coordinated activity, giving it an apparent capability to carry out its threats on a significant scale; (c) Black Panther Party members had had frequent contacts, both abroad and in the United States, with representatives of foreign governments having a demonstrated hostility to the United States; and (d) because I believed that the Black Panther Party was receiving funds for

its domestic activities from foreign government sources.

I based my belief in the need for the warrantless electronic surveillance on the Philadelphia headquarters of the Black Panther Party on information set forth in Federal Bureau of Investigation requests for the surveillances, which were submitted as Exhibits B, C, D, E, and F in connection with Defendants' Answers *In Camera* to Plaintiffs' Interrogatories to Defendants, on meetings with and briefings by the Director of the Federal Bureau of Investigation, and Black Panther Party literature which had been provided to me. This information reflected that, for example, (1) Black Panther Party leader Eldridge Cleaver had resided in or visited Cuba, Algeria, North Korea, the Soviet Union, North Vietnam, and the Peoples Republic of China; (2) Black Panther Party members had met in Sweden with representatives of the North Vietnamese government; and (3) Black Panther Party members had met with representatives of the Cuban government. This information supported my belief that these contacts were for the purpose of obtaining foreign funds to support Black Panther Party revolutionary activities, including the advocacy of the violent overthrow of existing Federal and state government structures. The threat of such a revolutionary overthrow was preceived [sic] by me to be especially serious in view of (1) the large number of Black Panther Party chapters in this country, (2) the large number of Black Pan-

ther Party members, (3) the numerous threats of personal attack that were being directed by the Black Panther Party against local law enforcement officers and even against the President of the United States, and (4) the seditious plan which had been prepared by the Black Panther Party to overthrow the government of the state of Illinois, a copy of which I have appended hereto as Exhibit A.

A review of the affidavit and deposition of John Mitchell [19] in conjunction with the supporting exhibits substantiates that probable cause existed to believe that activities of the Black Panther Party were a threat to the national security and that electronic surveillance of the headquarters in order to gather intelligence information about those activities was warranted. Furthermore, the information supplied to Mitchell by the FBI suggested the possibility that the Black Panther Party was receiving support from certain foreign sources.

I note that whether this constitutes a surveillance for foreign security rather than domestic security purposes is a difficult question [20] which need not at this time be finally resolved. If it was a "foreign security" surveillance, *Butenko*, *supra*, holds that a warrant was not required.[21] However, for the pur-

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[19] Deposition of John N. Mitchell, dated October 14, 1976.

[20] *See* note 13 *supra*; *Zweibon*, 516 F.2d at 613 n. 42.

[21] If it were determined that the surveillance was necessitated by a foreign threat then under the holding in *Butenko*, no warrant would have been required. On the other hand,

poses of this opinion, this tap, like the Daviddon tap, will be considered a "domestic security" surveillance within the perimeters of the *Keith* decision.

Although a review of the present record, as discussed above, suggests that there was a sufficient basis for the Attorney General to conclude that the nation's security was threatened, I am reluctant to conclude, absent a fully developed record, that the wiretaps in question were, in fact, solely for that purpose or that the use of electronic surveillance was the only or least intrusive means of acquiring the information necessary to protect against this alleged threat. I will, therefore, deny both plaintiffs' motion and defendants' cross motion for summary judgment, and require a full evidentiary hearing to determine whether these wiretaps were, in fact, for the purpose of protecting this nation from a bona fide threat to its internal security or whether defendants claim is merely a pretext for gathering information about certain political dissidents.

The existence of a genuinely disputed, material issue of fact is a bar to summary judgment which might alleviate the need for any further discussion of the present motions. However, if it is determined

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if it is considered a domestic security surveillance then, like the Daviddon tap, it becomes necessary to determine whether prior judicial approval was required by the subsequent decision in *Keith*. In either event, the surveillance was not solely for criminal or political information gathering purposes and the plaintiffs' claim that the failure to follow Title III's procedures must result in summary judgment in their favor, at this juncture, will be denied.

that the fourth amendment is applicable to this case, then the defendants' failure to secure prior judicial approval would be actionable even if, in fact, this surveillance was conducted for national security purposes. Therefore, a resolution of the question as to whether or not the defendants were constitutionally and statutorily required to seek judicial approval prior to initiating this surveillance even assuming a national security predicate, may alleviate the need for testing the factual basis for defendants' national security claim.

B. *Warrant Requirement*

Assuming that the wiretaps in question were conducted for the purpose of gathering information to protect against unlawful activities considered to be a domestic threat to the nation's security, did the surveillance, conducted without prior judicial approval, violate either the provisions of Title III for which a specific statutory remedy is provided and/or the plaintiffs' fourth amendment rights for which they may recover damages pursuant to the implied cause of action established by *Bivens, supra*? The answer to this question depends upon whether the defendants were required, at the time, to secure a warrant before initiating the surveillance.

1. *Fourth Amendment*

At the time these taps were installed, the scope of the President's constitutional power to authorize and

conduct warrantless wiretapping for national security purposes had not been delineated by the Supreme Court. It was not until almost a year and a half after these taps were terminated that the Supreme Court in *Keith, supra,* definitively settled the conflict between the fourth amendment and the President's constitutional power to protect the nation.

The defendants argue that the warrant requirement would derive only from a retroactive application of the *Keith* decision which they urge would be improper under the test for retroactivity enunciated in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).[22] In *Chevron,* the Supreme Court set forth the factors to be considered in determining a question of retroactivity.

> First, the decision to be applied nonretroactively must establish a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been

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[22] For a general discussion of the rules governing retroactivity which have evolved from the numerous Supreme Court decisions. *See* Justice Harlan's dissent in *Desist* v. *United States,* 394 U.S. 244, 256-69, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1968) (dissenting opinion). Although that discussion centers on retroactivity in the context of criminal litigation, the Court apparently has not distinguished between civil and criminal cases or constitutional and nonconstitutional issues in developing this area of jurisprudence. *See Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 105-106, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); *Linkletter* v. *Walker,* 381 U.S. 618, 626-627, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1964).

> stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

(citations omitted), *id.* at 106-107, 92 S.Ct. at 355.

The defendants rely essentially upon the footnote in the *Katz* decision, the proviso embodied in § 2511 (3) of Title III, both of which are quoted *supra*, and the practices of predecessor administrations as establishing that prior to the decision in *Keith*, warrantless wiretapping for national security purposes was a constitutionally permissible practice. They argue, therefore, that *Keith* resolved an issue of first impression which constituted an abrupt change in the law, the retroactive application of which would result in substantial inequitable hardship without furthering the purpose or effect of the newly enunciated rule.

The defendants' reliance upon prior Executive action, the footnote by the Supreme Court and the statutory proviso, as indicia of an established controlling principle of constitutional dimension is misplaced. At best, these indicia establish only that prior to the decision in *Keith*, the law was unsettled. The

courts which had the occasion to consider the convergence of the Executive's power and the limitations of the fourth amendment prior to the Supreme Court's ruling in *Keith*, reached differing conclusions.[23] Fur-

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[23] *See United States* v. *Clay*, 430 F.2d 165 (5th Cir. 1970) (*rev'd on other grounds*, 403 U.S. 698, 29 L.Ed.2d 810 (1971) (surveillance for purpose of gathering foreign intelligence information does not require prior judicial approval); *United States* v. *Dellinger*, No. 69 Cr. 180 (N.D. Ill., Feb. 20, 1970) (warrant not required prior to surveillance for "national security" purposes); *United States* v. *O'Neal*, Cr. No. KC-CR-1204 (D. Kan. Sept. 1, 1970) (warrant not required prior to surveillance for "national security" purposes); *United States* v. *Butenko*, 318 F.Supp. 66 (D. N.J. 1970), *aff'd* 494 F.2d 593 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974) (surveillance for purpose of gathering foreign intelligence information does not require prior judicial approval); *United States* v. *Brown*, 317 F.Supp. 531 (E.D. La. 1971) (warrant not required for foreign security surveillance); *United States* v. *Smith*, 321 F.Supp. 424 (C.D. Calif. 1971) (warrant required prior to conducting surveillance of domestic organization threatening national security); *United States* v. *Sinclair*, 321 F.Supp. 1074 (E.D. Mich.), *aff'd sub nom. United States* v. *United States District Court*, 444 F.2d 651 (6th Cir. 1971), *aff'd* 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (judicial approval required prior to conducting electronic surveillance for domestic threat to national security); *United States* v. *Hilliard*, Cr. No. 69-181 (N.D. Calif. May 4, 1971) (warrant required prior to surveillance for domestic security purposes); *United States* v. *Donghi*, Cr. No. 1970-81 (W.D.N.Y. May 14, 1971) (warrant required prior to surveillance for domestic security purposes); *United States* v. *Hershkovitz*, 71 Cr. 399 E.L.P. (S.D. N.Y. Sept. 14, 1971) (noted distinction between warrant requirement for surveillance of domestic or foreign threats to national security); *United States* v. *Hoffman*, 334 F.Supp. 504 (D.D.C. 1971) (warrantless surveillance of domestic security threat illegal). The cases generally distinguished between threats emanating from domestic sources

thermore, despite continued executive prodding, Congress consistently refused to statutorily authorize such conduct and with the passage of the comprehensive statutory scheme governing electronic surveillance embodied within Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2520, Congress merely provided that whatever constitutional power the President may possess outside the strictures of the fourth amendment was not to be affected by the provisions of this legislation. *Keith, supra,* 407 U.S. at 321-324, 92 S.Ct. 2125. The extent of the Supreme Court's pronouncements in this area, prior to *Keith,* was the footnote in the *Katz* decision which recognized only that the question of the proper delineation of the limitations placed upon the executive power by the fourth amendment was not an issue to be resolved in that decision. Moreover, three of the justices, in concurring opinions, expressed differing views as to the scope of those limitations.[24]

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and those emanating from foreign sources. The Supreme Court's decision in *Keith* requires prior judicial approval only in the context of electronic surveillance for purposes of gathering information pertaining to threats to the nation's security emanating from domestic sources. The question of the fourth amendment's application to surveillance conducted pursuant to the Executive's foreign affairs power was left undecided. *But cf. United States* v. *Butenko,* 494 F.2d 593 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974).

[24] Justice Douglas in a concurring opinion with Justice Brennan, expressed the opinion that the fourth amendment required prior judicial approval for electronic surveillance

The fact that the law in this area was unsettled prior to the decision in *Keith* supports two possible conclusions each suggesting a different result as respects the question of the retroactive application of that decision. The defendants urge that the proper conclusion is that *Keith*, clarifying an area of the law theretofore unsettled, resolved an issue of first impression which was not clearly foreshadowed and should not, therefore, be applied retroactively. However, the lack of any guiding principle of law prior to the *Keith* decision also supports the conclusion that *Keith* did not constitute an abrupt break with prior precedence but, merely set forth, for the first time, what had previously been the unstated law.[25]

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even when conducted for national security purposes. *Katz*, *supra* at 359-360, 88 S.Ct. 507. Justice White on the other hand, felt that the warrant procedure was not mandated when the President and the Attorney General determine that a national security threat exists and that electronic surveillance is reasonable. *Id.* at 364, 88 S.Ct. 507.

[25] The Supreme Court in *Hanover Shoe* v. *United Shoe Mach.*, 392 U.S. 481, 497-499, 88 S.Ct. 2224, 2233-2334, 20 L.Ed.2d 1231 (1967), a case dealing with the retroactive application of the decision in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946), which had held that proof of predatory practices was not essential to a claim of monopolization in violation of § 2 of the Sherman Act, described a situation not dissimilar to the case *sub judice*. The Court used the following language in applying the holding in *American Tobacco* retroactively:

> In the *American Tobacco* case, this court noted that the precise question before it had not been previously decided, 328 U.S., at 811 [66 S.Ct., at 1128], and gave no indication that it thought it was adopting a radically

See Forsyth v. *Kleindienst*, Civil No. 72-1920, 447 F.Supp. 192 (E.D. Pa. 1978) (Broderick, J.).

I need not, however, necessarily reach the question of retroactivity. Assuming *arguendo* that *Keith* is limited to prospective application only, I would have to then decide whether, absent the controlling principle enunciated in *Keith*, the fourth amendment required the Attorney General to secure judicial approval prior to conducting the surveillance in question despite its alleged national security purpose. Because, I believe, for the reasons to follow, that the fourth

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> new interpretation of the Sherman Act. Like the Court of Appeals, this Court relied for its conclusion upon existing authorities. These cases [*American Tobacco* and the Second Circuit Court of Appeals decision in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (1945)] make it clear that there was no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices by the monopolist. In neither case was there such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one. Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks. We cannot say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation or maintenance of a monopoly, so long as they avoided direct exclusion of competitors or other predatory acts.
>
> (footnotes omitted).

amendment required that a warrant be secured in this instance, I will refrain from deciding the difficult question of retroactivity posed by the subsequent decision in *Keith*.[26]

The fourth amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

There is no question that the electronic surveillance in this case constituted a search and seizure of the private telephone conversations of these plaintiffs. *Katz, supra.* As such this surveillance conducted

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[26] The primary question in dealing with the retroactive application of a particular principle of law is whether the parties were or were not justified in relying upon the prior state of the law. *See Kacher* v. *Pittsburgh National Bank*, 545 F.2d 842, 847-853 (3d Cir. 1976) (Gibbons, J. dissenting). This question becomes somewhat more complicated in the context of a civil rights damage action against government officials because of the presence of the qualified immunity defense which likewise raises the issue of justifiable reliance. Although a decision on the retroactivity issue does not necessarily foreclose a determination on the immunity question, the two are clearly interdependent. The question of justifiable reliance involves factual considerations which may be more appropriately resolved after a full evidentiary hearing. Moreover, the retroactivity question need not be resolved in light of the fact that an analysis of the relevant fourth amendment case-law leads me to the conclusion that a warrant was required in this instance aside from the Supreme Court's subsequent pronouncement in *Keith*.

without a warrant was *per se* unreasonable and in violation of the dictates of the fourth amendment.[27] *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970).

The failure to procure a warrant, fatal in most instances, is, however, permissible in certain carefully delineated circumstances. Where the search is conducted incident to a lawful arrest, the failure to first secure a warrant is not violative of the fourth amendment. *United States* v. *Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *United States* v. *Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The warrantless search of a vehicle is likewise permissible under certain circumstances. *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *Texas* v. *White*, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975) (per curiam); *Cardwell* v. *Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); *Cady* v. *Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973); *Chambers* v. *Maroney*, 399 U.S. 42, 90 S.Ct. 225, 24 L.Ed.2d 177 (1970); *Cooper* v. *California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *Preston* v. *United States*, 376 U.S. 364, 84

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[27] Aside from the warrant requirement, the fourth amendment also requires that even warranted search and seizures be conducted in a reasonable manner. *Berger, supra.* The question of the reasonableness of the manner in which this particular surveillance was conducted is discussed in Part II, C, of this opinion.

S.Ct. 881, 11 L.Ed.2d 777 (1964); *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

In the presence of certain exigent circumstances, a warrant is not required. For example, where the officers are in hot pursuit of a fleeing felon. *United States* v. *Santana*, *supra*; *Warden* v. *Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *Chapman* v. *United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961); *Johnson* v. *United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); or where the goods seized were in the process of being destroyed or are of the type that are easily disposed of, *Roaden* v. *Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1972); *Schmerber* v. *California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *United States* v. *Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed.2d 59 (1951); *McDonald* v. *United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed.2d 153 (1948); or where the goods were about to be or easily could be removed from the jurisdiction, *Chapman* v. *United States*, *supra*; *Johnson* v. *United States*, *supra*; *United States* v. *Jeffers*, *supra*.

A warrantless search of an automobile is permissible if done for the purpose of inventorying its contents. *South Dakota* v. *Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *Cooper* v. *California*, *supra*. Contraband and other evidence may be seized without a warrant when it is within the plain view of an officer legally in its presence. *Cool-*

idge v. *New Hampshire, supra; Harris* v. *United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968). And, of course, a warrantless search and seizure is permitted when it is conducted pursuant to constitutionally valid consent. *United States* v. *Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *United States* v. *Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

In addition, under certain recognized circumstances, limited searches are permitted without the need to first secure prior judicial approval. An officer may conduct a limited search or "frisk" for the purpose of discovering concealed weapons where he has reason to suspect the individual is involved in criminal activity and he has reason to believe the individual is armed. *Adams* v. *Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Limited warrantless searches based on less than probable cause are also permitted for the purpose of protecting the nation's borders. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States* v. *Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 46 L.Ed. 2d 623 (1975); *United States* v. *Peltier*, 422 U.S. 531 (1975); *Bowen* v. *United States*, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).

Although none of these exceptions are directly applicable to the circumstances of this case, an analysis of the evolution of this body of caselaw suggests the appropriate analytical framework for determining whether an exception should be permitted under the facts of this case. In each case in which the Court has recognized an exception to the warrant requirement, the analysis employed involved a balancing of the relevant interests and a determination that the individual's right of privacy protected by the fourth amendment was outweighed by the public's interest in allowing the search and seizure to be conducted without the prior approval of an impartial magistrate. A review of the court's rationale justifying these exceptions points out the distinction between those cases and the present case.

Recognition of the paramount importance of protecting the police officer's safety and preventing the destruction of evidence was the persuasive factor underlying the contemporaneous search incident to a lawful arrest, stop and frisk and exigent circumstances exceptions. These factors coupled with the lesser expectation of privacy rationale constitute the basis for the vehicle search exception. The need to protect officials acting in a reasonable and normal manner from civil liability provides the basis for the inventory search exception. The plain view and consent exceptions are derived from the common sense observations that something left in the open to public view is not intended to be kept private and that the search of an area to which the possessor has con-

sented is no longer violative of that person's expectation of privacy. Finally, the justification for the border search exception is the national interest in protecting our borders from the entry of illegal aliens, contraband and other customs violations and recognition of the fact that the delay in securing a search warrant, if required, would so hamper that purpose that a limited administrative type search is permitted without a warrant.

It is evident that in following a balancing approach the Court has given great weight to the necessity in certain circumstances for immediate official action either to protect the officer's safety, prevent the destruction of evidence or because other exigencies of the particular situation requires the officer to act "now or never." *Roaden* v. *Kentucky, supra* 413 U.S. at 505, 93 S.Ct. 2796. At the same time the Court has been reluctant to extend these exceptions beyond those cases where the Government is able to show that immediate action was absolutely necessary. The Court's recognition of the important role that the warrant requirement plays in preserving the individual's rights, as exemplified by the statement in *McDonald* v. *United States, supra* 335 U.S. at 455-456, 69 S.Ct. at 193, provides the counterbalancing factor in this analytical framework:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done

> not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose jobs is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Furthermore, the already difficult burden of showing that the exigencies of the situation made a warrantless search and seizure reasonable under the fourth amendment is perhaps heightened in this case where the thing seized was the plaintiffs' conversations and the ideas expressed therein which in the context of a national security investigation involving political dissidents may well implicate first as well as fourth amendment rights. Quoting from *Stanford* v. *Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965), the Court in *Roaden* v. *Kentucky, supra* 413 U.S. at 504-505, 93 S.Ct. at 2801, involving the warrantless seizure of allegedly obscene films, recognized that first amendment implications may require a more considered analysis of "reasonableness."

> The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression . . . calls for a higher hurdle in the evaluation of reasonableness . . .
>
> > "In short, . . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for the seizure is the ideas which they contain. No less a standard could be faithful to First Amendment freedoms. . . .

(citations omitted).[28]

Weighing the interests implicated by this case, the need to conduct a covert investigation of the plaintiffs' actions in order to protect against a perceived threat to the nation's security against the individual's right of privacy as protected by the warrant clause of the fourth amendment, the government has not met the burden necessary to excuse the failure to procure a warrant prior to conducting this surveillance.

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[28] The government also recognizes the importance of protecting oral communications between private individuals. As noted in footnote 4 in *United States* v. *Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977),

> The Government acknowledges that the core values the Fourth Amendment protects are privacy interests. In its view, those privacy interests which should receive the "maximum protection from governmental search and seizure" provided by the Warrant Clause include private oral and electronic communication . . . Brief for the United States 30.

Armed with the information accumulated by the federal agents, the appropriate authorities could easily have secured a warrant without jeopardizing their own safety or the investigation. There were no exigent circumstances of which I am aware, based on the present record, which would justify the initiation of this surveillance without first taking the necessary steps to protect the plaintiffs' constitutionally mandated rights.

No doubt the interest involved here, that of the nation's security, is of great importance to our citizenry but that alone does not constitute sufficient justification for exempting the plaintiffs' rights from the constitutional protection to which they are entitled. The dangers inherent in allowing even well intentioned executive action to go unchecked solely because it was undertaken in the name of national security were among the primary reasons the founding fathers insisted upon the protections embodied in our constitutional system of checks and balances and more particularly the specific commands of the bill of rights. *See Stanford* v. *Texas, supra* 379 U.S. at 481-485, 85 S.Ct. 506.

This is not to suggest that there is little merit in the government's concern that disclosure of confidential information to a magistrate in order to secure a warrant might endanger the delicate nature of this type of investigation. Certainly all precautions must be taken to avoid breaching the confidentiality of the investigation and to ensure that the proper judicial officer is sufficiently informed so as to be capable of

reaching a determination of probable cause in the context of a national security as compared to a criminal investigation.[29] The fact is, however, that it is precisely in this type of investigation where the interests are significant and the government action necessarily covert that the individual's rights tend to be subverted and must, therefore, be even more scrupulously guarded. Recognition of this fact led Mr. Justice Stewart, in writing for the majority of the Court in *Coolidge* v. *New Hampshire, supra* 403 U.S. at 454-455, 91 S.Ct. at 2032 to state:

> [T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagent" to some. But the values were those of the authors of our

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[29] In *Keith* the Court noted that the need for confidentiality and sufficient expertise were important considerations in weighing the need for a warrant but that these concerns could be dealt with without requiring subversion of the individual's fourth amendment rights.

> fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

(citations omitted).

Following this precept, it is my determination that the government has failed to satisfy the difficult burden of showing that the circumstances under which this search and seizure was conducted requires an exception to the fourth amendment's command that a neutral judicial officer be interposed between the government and the citizen. A warrant was required and the failure to procure one prior to initiating this surveillance violated the plaintiff's constitutionally protected rights.

2. *Title III*

The plaintiffs claim that defendant's actions violated the provisions of Title III in that they failed to comply with the procedures set forth in § 2518 prior to installing these wiretaps. Resolution of this claim depends upon the factual determination of whether national security was the root of this investigation and, as noted in Part II, A of this opinion, that determination must await a full hearing on the merits.

If it is determined that this surveillance was aimed at uncovering criminal activity or for the purpose of political harassment, then the provisions of Title III would clearly be applicable and the defendants' failure to follow the statutorily proscribed procedures would be actionable pursuant to the specific provisions of § 2520 and subject to the statutory immunity defense provided therein.[30] On the other hand, if it is determined that the nation's security was reasonably endangered and this surveillance was aimed at and for the purpose of alleviating that danger, then this wiretap would be outside the purview of Title III because of the explicit disclaimer embodied in § 2511(3).

I am aware of Judge Wright's opinion for the plurality in *Zweibon* v. *Mitchell*, *supra* at 663-664 in which it was held that the standards and procedures of Title III apply even to electronic surveillance conducted pursuant to the President's constitutional power to protect this nation from internal subversion. The reasoning of that opinion relies essentially on the "disclaimer" interpretation given to § 2511(3) by the *Keith* decision. As noted above, *Keith* interpreted § 2511(3) as a statement of Congressional neutrality with respect to wiretapping conducted pursuant to whatever constitutional power the President enjoys in carrying out his duty to protect the nation. *Keith*, having determined that the fourth amendment limits even national security investigations, the *Zweibon*

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[30] See Part I, B of this opinion.

Court reasoned that the President has no constitutional power with regard to national security wiretapping and, therefore, the § 2511(3) disclaimer was inoperative.

My reading of the *Keith* decision, however, differs from that of the plurality in *Zweibon*. Initially, the *Keith* Court refuted the government's argument that § 2511(3) conferred or at least recognized the President's power to conduct warrantless electronic surveillance. The Court held that

> Section 2511(3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them.

Keith, supra 407 U.S. at 303, 92 S.Ct. at 2130.

After analyzing the context in which § 2511(3) appeared within the statutory scheme of Title III, the Court stated:

> We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances.

Id. at 306, 92 S.Ct. at 2131 (footnote omitted). The Court's consideration of Title III's application to national security surveillances did not end, however, with this conclusion. In the final portion of the opinion, after holding that the fourth amendment limited the President's power to use electronic surveillance as

an investigative tool for national security purposes, the Court emphasized that this determination did not necessarily require that executive action in this area comport with Title III's procedures.

> Moreover, we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.
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> Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citi-

> zens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. . . . It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could, in sensitive cases, be made to any member of a specially designated court (*e.g.*, the District Court for the District of Columbia or the Court of Appeals for the District of Columbia Circuit); and that the time and reporting requirements need not be so strict as those in § 2518.
>
> The above paragraph does not, of course, attempt to guide the congressional judgment but rather to delineate the present scope of our own opinion. We do not attempt to detail the precise standards for domestic security warrants any more than our decision in *Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III.

Id. 407 U.S. at 322, 92 S.Ct. at 2139 (citations omitted).

Although the *Zweibon* Court read this language to mean that § 2511(3) was a disclaimer only insofar as the Executive's action was constitutional and that once it was determined that the fourth amendment required a warrant even for national security surveillance, then the full panoply of Title III procedures and remedies became applicable to this type of

surveillance. My understanding of *Keith* suggests that the § 2511(3) disclaimer is much broader in scope and excises electronic surveillance for national security purposes completely from the purview of Title III despite the fourth amendment's application. The Court's language in *Keith* appears to be a recognition that the provisions of Title III were tailored to the use of electronic surveillance in the criminal investigation sphere and not the investigation of national security threats.

If after a hearing on the merits, it is established that the surveillance in question was conducted for national security purposes pursuant to the President's constitutional duty to protect the nation from such internal threats, then the plaintiffs' statutory claim based on the defendants' admitted failure to comply with the procedures of Title III will be denied on the grounds that § 2511(3), as interpreted by the Supreme Court in *Keith*, exempts such surveillances from the purview of that Act. If, however, the national security predicate is, in fact, nonexistent, as the plaintiffs claim, then the defendants' failure to comply with the standards and procedures set forth in § 2518 would allow the plaintiffs to avail themselves of the specific remedies set forth in § 2520 subject to the good faith defense specified in that section.

The claim against defendants, Saxbe and Kelly, who were admittedly not in any way connected with or responsible for the authorization or effectuation of these wiretaps, is based solely on the allegation that they subsequently used or disclosed the inter-

cepted communications in violation of § 2520 of Title III. The plaintiffs have failed to produce any evidence which would refute the defendants' disclaimer of any disclosure or use of this information outside that required by the criminal litigation generated by the prosecution of those individuals alleged to have been involved in the kidnap plan.[31] (*See* defendants' answers to plaintiffs' interrogatories No. 6(d)(iii)). Defendants, Saxbe and Kelly, having taken office subsequent to the termination of the wiretaps in question and there being no support on the record for plaintiffs' allegations of use and disclosure,[32] I see no basis for holding these defendants liable.

C. *Reasonableness of the Wiretaps*

Plaintiffs contend that even if the wiretaps did not require prior court approval, the manner in which they were authorized by the Attorney General, and conducted by the surveillance teams constituted unreasonable searches and seizures under the fourth amendment. Where a warrant is required, but not obtained, the search and seizure is unreasonable *per se*. *Keith*, *supra* at 314-318, 92 S.Ct. 2125. Even if no warrant was required, the fourth amendment

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[31] *See* note 1, *supra*.

[32] The final sentence in an FBI report attached as Exhibit L to defendants' answers to plaintiffs' interrogatories states that the information would be "disseminated to interested desks in Philadelphia and to interested agencies in Philadelphia." This report predated the tenure of Messrs. Saxbe and Kelly, and there is nothing to establish that the information was, in fact, disclosed in accordance with that report.

mandates that the search and seizure be reasonable in its execution. The standards upon which to determine whether a search and seizure is conducted in a reasonable manner are best defined in *Berger, supra.* (*See* Part I, B).

The FBI submitted written requests to the Attorney General in order to obtain his approval to conduct the surveillances. These reports, Exhibits B through H attached to defendants' answers to interrogatories, contain what appears to be adequate information to establish the existence of a bona fide threat to national security. The requests, however, are broad in scope without a delineation of precisely what information is to be sought and monitored. The apparent purpose of the proposed surveillance was to obtain broad general information about the activities of the ECCSL and Black Panther Party. The requests state that "valuable information" will "most likely" be obtained. Authorization for the Black Panther tap was granted based upon a report which states:

> A telephone surveillance at B.P.P. headquarters in Philadelphia will furnish valuable information concerning the revolutionary activities of the B.P.P. in the United States, particularly in regard to activities in the densely populated metropolitan area surrounding Philadelphia where a number of extremist plots have been initiated in the past.

The Davidon tap was authorized on the basis of a report which states:

> A telephone surveillance at B.P.P. headquarters will undoubtedly provide extremely valuable information concerning information relating to activities of the ECCSL, as well as information regarding his involvement in the United States.

Defendants' Answers to Interrogatories, Exhibits B, G.

Neither the requests nor the authorizations appear to restrict the persons whose conversations are to be overheard or the types of conversations that will be monitored. The result is that the authorizations on their face would permit surveillance of any phone calls by any persons on the telephones that were to be tapped.

Both taps were re-authorized for additional periods of time without any substantial showing of necessity. The re-authorization requests merely stated that valuable information has been received concerning the activities of the two organizations, and that it is anticipated that continuing the wiretaps will reveal further information.

In a wiretap conducted for purposes of protecting national security, the type of conversations to be overheard may be far more difficult to precisely define and limit in advance of the actual surveillance than in a criminal investigation. Nevertheless, the "reasonableness" requirement of the fourth amendment is applicable.

In the present case the authorizations may have been overly broad. The issue, however, must depend

on the facts concerning the manner in which the surveillance was actually conducted. If, in executing the surveillances, the conversations overheard and recorded were limited to what appeared to relate to national security threats and were promptly terminated when apparently unrelated conversations were involved, and if the surveillances were otherwise conducted in a manner that was reasonable, then, irrespective of the broad authorizations, the plaintiffs' fourth amendment rights would not be violated.

The record discloses a number of disputed facts as to the manner in which the wiretaps were conducted. Although the logs reveal the content of the overheard conversations, the ultimate issue of reasonableness must resolve upon a consideration of all the relevant then existing circumstances. A decision by way of summary judgment would not be proper. An evidentiary hearing to develop, weigh and analyze all of the facts is essential. The cross motions for summary judgment as to the defendant, John Mitchell, and the officers who conducted the wiretaps will be denied to the extent that this factual issue remains unresolved.

D. *Immunity*

The defendants have also asserted the defense of official immunity as a bar to any liability for conducting these warrantless wiretaps. To enjoy the defense of qualified immunity [33] the defendants must

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[33] The defendants have requested reconsideration of the decision in the prior opinion in this case, which held that only qualified as opposed to absolute immunity was available to

establish, by a preponderance of the evidence, that (1) they did not know and reasonably need not have known that overhearing the plaintiffs' conversations through the use of a wiretap installed for national security purposes, without first securing a warrant, violated the fourth amendment, and (2) they acted without malicious intention to (a) deprive the plaintiffs of their constitutional rights or (b) cause them to suffer other injury. *Skehan* v. *Board of Trustees*, 538 F.2d 53, 62 (3d Cir.) (en banc), *cert. denied*, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1976).

The opinion in *Skehan, supra*, suggested and later cases have recognized that the presence or absence of a qualified, good faith immunity depends upon factual considerations and should be determined on the basis of evidence adduced at trial rather than on a motion for summary judgment. *See Kacher* v. *Pittsburgh National Bank*, 545 F.2d 842, 853 (3d

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federal officials who acted in violation of the plaintiff's civil rights. Defendants argue that application of *Scheurer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) and *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975) which established only qualified immunity for state executive officials violating civil rights, was improper because defendants in this case were federal officials. I decline to reconsider my earlier decision with the one addendum that the policy enhanced by qualified rather than absolute immunity of executive officials who act in such a manner as to violate constitutionally protected rights would seem to be the same for federal as well as state officials. *See Thompson* v. *Burke*, 556 F.2d 231, 238 (3d Cir. 1977); *Brawer* v. *Horowitz*, 535 F.2d 830, 834 (3d Cir. 1976); *Paton* v. *La Prade*, 524 F.2d 862, 872 (3d Cir. 1975); Note, 50 *Temp.L.Q.* 191 (1976).

Cir. 1976) (Gibbons, J. dissenting); *Forsyth* v. *Kleindienst, supra.* Recently, however, the Supreme Court reviewed the scope of this affirmative defense as it was developed in *Scheurer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) and *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), and held that state prison officials were entitled to a qualified immunity as a matter of law in a suit brought by a state prisoner pursuant to 42 U.S.C. § 1983 for the alleged violation of his civil rights as a result of the defendant's interfering with his mail. *Procunier* v. *Navarette*, —— U.S. ——, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). The basis for this holding, as stated by the Court, was that

> whether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court, there was no "clearly established" First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971-1972.[34] As a matter of law, therefore, there was no basis for rejecting the immunity defense on the ground that petitioners knew or should have known that their alleged conduct violated a constitutional right. Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct

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[34] The plaintiff claimed that the interference with his outgoing mail occurred between September 1, 1971 and December 11, 1972.

> "cannot reasonably be characterized as in good faith." *Wood* v. *Strickland, supra*, 420 U.S., at 322, 95 S.Ct., at 1001.

Id. 98 S.Ct. at 861 (footnotes omitted).

Procunier is distinguishable from the present case. This case is concerned with the fourth amendment's warrant requirement which the decision in *Katz* "clearly established" as applicable to wiretapping conducted by government officials. Whether the defendants in good faith believed that national security wiretapping remained exempt from the warrant requirement of the fourth amendment and whether that belief was reasonable, at the time, in light of footnote 23 in the *Katz* decision, the proviso in § 2511(3) of Title III and the practices of prior administrations are factual questions which as noted by the Court in *Skehan, supra* at 62, will require, *inter alia*,

> [an inquiry] into the status and responsibility of each individual defendant and [a determination as to] the same level of knowledge of constitutional rights [to which the defendants should be held responsible] . . . as well as the relative certainty of the legal issue . . .

all of which must be adjudged in light of the circumstances surrounding this particular surveillance.[35] *Thompson* v. *Burke, supra* at 236.

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[35] The question is a difficult one which to a great extent will depend on the actual perceptions of the defendants at the time as to the legality of their actions weighted in light of the degree to which the law in this area was unsettled and taking into consideration the fact that defendants were the chief law enforcement officer of the United States and his agents.

Additionally, the Court in *Procunier*, *supra* —— U.S., at ——, 98 S.Ct., at 856, also held that the defendants should not be denied the immunity defense under the second branch of the *Wood* v. *Strickland*, *supra*, standard which permits liability where the official acts with "malicious intention" to deprive the plaintiff of a constitutional right or to cause him "other injury." The Court noted that the complaint in *Procunier* claimed only "negligent" interference with plaintiffs' mail and therefore there was no basis for denying defendants immunity on the grounds that they acted to "intentionally injure" plaintiffs' civil rights. The present case, however, encompasses a claim that defendants acted in bad faith for the purpose of political harassment and with the intention of violating plaintiffs' first and fourth amendment rights. If plaintiffs are able to substantiate this claim after a full hearing on the merits, the defendants' assertion of immunity would be defeated.

III.

Conclusion

The cross-motions for summary judgment will be denied because it appears that certain material factual issues are genuinely disputed. A full evidentiary hearing will be required to determine (1) whether the wiretaps in question were conducted for national security purposes or solely for the purpose of investigating criminal or political activity; (2) whether, even if conducted for national security purposes, the defendants are immune from any liability for their

failure to secure a warrant in compliance with the fourth amendment and (3) whether, in any event, this surveillance was conducted in a reasonable manner under the fourth amendment as interpreted in *Berger* v. *New York, supra.*

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